Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-VS-

KEITH ROYAL PHILLIPS
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (*Ring II*), this Court held that the Sixth Amendment entitles an Arizona capital murder defendant to have a jury, rather than a judge, determine the presence of at least one aggravating circumstance that renders the defendant death eligible. *Ring II* extended to capital cases the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2002), that the Sixth Amendment jury trial right applies to the determination of a fact that increases the sentencing range for a charged offense. *Id.*

Did the Arizona Supreme Court err by holding that *Ring II* requires not only a jury determination of an aggravating factor rendering the defendant eligible for the death penalty, but also a jury determination of mitigating circumstances and whether mitigating circumstances are sufficiently substantial to warrant leniency?

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On May 6, 2003, the Arizona Supreme Court vacated Keith Phillips' death sentence and remanded the case for resentencing upon finding that *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*), requires that a jury determine whether every aggravating circumstance alleged has been established, and whether mitigating circumstances warrant leniency. *State v. Phillips*, 67 P.3d 1228, ¶¶ 8, 11–15 (Ariz. 2003). (Appendix A.)

The Arizona Supreme Court had previously upheld Phillips' convictions and sentences on direct appeal. *State v. Phillips*, 46 P.3d 1048 (Ariz. 2002). Shortly after that decision, and before the Arizona Supreme Court issued its mandate, this Court issued its ruling in *Ring II*. On July 17, 2002, the Arizona Supreme Court issued an order consolidating the instant case with other Arizona death penalty cases pending on direct appeal, and ordered briefing to address several issues relating to *Ring II's* applicability to those cases

On April 3, 2003, the Arizona Supreme Court issued a ruling in the consolidated cases, holding among other things that (1) capital sentences imposed under Arizona's prior capital sentencing scheme are subject to review for harmless error; (2) the Sixth Amendment does not afford capital defendants the right to have a jury decide whether the State has established an aggravating circumstance based on the defendant's prior convictions; and (3) the presence of one or more capital aggravating factors found in accordance with Sixth Amendment principles does not, in itself, establish that *Ring II* error is harmless, because *Ring II* error should be interpreted to include the absence of a jury determination of mitigating circumstances and the weighing and balancing of aggravating and mitigating circumstances. *State v. Ring*, 204 Ariz. 534, at ¶¶ 50, 63, 88–89, 65 P.3d 915 (Ariz. 2003) (*Ring III*) (Appendix B.)

Applying *Ring III* to Phillips, the Arizona Supreme Court found that one of the aggravating circumstances (25 prior convictions for serious offenses) fell outside the purview of *Ring II*. 67 P.3d 122[illegible], ¶ 5.

The Arizona Supreme Court ruled, however, that it could not conclude beyond a reasonable doubt that a reasonable jury would necessarily find that the State proved the pecuniary gain circumstance beyond a reasonable doubt. *Id.* at ¶¶ 6–12. In spite of sustaining one aggravating circumstance that made Phillips eligible for the death penalty, the Arizona Supreme Court went on to hold that *Ring II* error occurred because the court could not conclude whether a reasonable jury would have found the same mitigation the trial court found, or whether the jury might have given the mitigation sufficient weight to warrant leniency. *Id.* at ¶¶ 13–15. Accordingly, the court remanded the case for resentencing. *Id.* at ¶ 15.

STATEMENT OF JURISDICTION

The State of Arizona respectfully requests that a Writ of Certiorari issue to review the decision of the Arizona Supreme Court that vacated Phillips' death sentence and remanded for resentencing. The Arizona Supreme Court issued its decision on May 6, 2003. The State timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a); and Supreme Court Rule 10.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

On May 8, 1998, the Pima County Grand Jury indicted Keith Royal Phillips and Marcus Lasalle Finch on 25 counts of aggravated assault; 21 counts of kidnapping; seven counts of armed robbery; two counts of attempted first-degree murder; and one count of first-degree murder. The charges arose from a series of three armed robberies. Phillips and Finch were tried jointly, but with separate juries.

1. *Famous Sam's at Silverbell/Grant.*

Phillips and Finch committed the first robbery in the early morning hours of April 12, 1998. When they entered the open rear door of a Famous Sam's in Tucson, Arizona, Phillips had a handgun, and Finch had a sawed-off .22 rifle. Phillips and Finch herded the cook and the manager into the cooler. Waitress Shelly Raab was stacking chairs. When Finch walked up to her, she dropped to her knees. At arm's length, Finch shot her in the chest, the bullet fragmenting her liver, lung, and stomach.

Holding his gun to the manager's head, Phillips told her that she had 10 seconds to give him the money or he would put a hole in her head. She gave him the money, and he and Finch fled.

2. *The Firelight Lounge.*

On the evening of April 23, 1998, Phillips and Finch robbed the Firelight Lounge in Tucson after casing it. Phillips and Finch forced everyone to lie down, robbed them, then herded them one at a time into the women's restroom. Phillips pointed his gun directly at Bill Gilson's head and told him to stand up and move toward the women's restroom. As Bill walked through the door of the restroom, with his hands over his head, Phillips shot him twice in the back. Bill survived, but one bullet collapsed his right lung, and the second one entered the pericardium, the sac surrounding the heart. Fragments from one of the bullets traversed his diaphragm and spleen, knocked off a piece of his liver, and perforated his lower intestines.

Two of the victims identified Phillips and Finch from photographic lineups the day after the robbery, and at trial.

3. *Famous Sam's at Valencia/Cardinal.*

In the early morning hours of April 28, 1998, Phillips and Finch committed their last robbery at the Famous Sam's at Cardinal and Valencia in Tucson.

Phillips lifted his sawed-off .22 rifle and fired directly at the backs of several patrons seated at the bar. Phillips seemed to be aiming directly at customers. Kathleen Francisco, who was facing Phillips, testified that he fired at least seven rounds in her direction—one of them flew through her hair.

Kevin Hendricks, a double amputee, was playing pool in the back with his niece Evelyn and two friends. When Phillips began shooting in the front of the bar, Kevin went out the back door. Finch, armed with a handgun, suddenly emerged from a restroom and went out the back door. Finch shot Hendricks twice in the back; Hendricks bled to death.

After the jurors convicted Phillips of first degree murder, as well as multiple counts of aggravated assault, kidnapping, and armed robbery, the trial court held an aggravation-mitigation hearing to determine the sentence for murder. The trial court found that the State proved beyond a reasonable doubt the existence of A.R.S. § 13–703(F)(2) (previous convictions of serious offenses—multiple convictions for armed robbery, kidnapping, and aggravated assault), and A.R.S. § 13–703(F)(5) (murder committed with the expectation of pecuniary gain). The trial court ruled that Phillips failed to establish that his capacity to appreciate the nature of his actions was significantly impaired at the time of the murder, or that his age at the time of the murder was mitigating. The trial court imposed the death penalty for the murder of Kevin Hendricks after finding that the proffered non-statutory factors did not warrant leniency, and that either of the two aggravating circumstances outweighed the mitigation.

On May 24, 2002, the Arizona Supreme Court affirmed the convictions and sentences, including the death penalty. *State v. Phillips*, 46 P.3d 1048 (Ariz. 2002).

Subsequently, this Court rendered its decision in *Ring v. Arizona*, 536 U.S. 584 (2002) (*Ring II*). On July 17, 2002, the Arizona Supreme Court issued an order consolidating the instant case with other Arizona death penalty cases pending on direct appeal, and ordered briefing to address several issues relating to *Ring II's* applicability to those cases.

On April 3, 2003, the Arizona Supreme Court issued a ruling in the consolidated cases, holding among other things that (1) capital sentences imposed under Arizona's prior capital sentencing scheme are subject to review for harmless error; (2) under *Ring II* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Sixth Amendment does not afford capital defendants the right to have a jury decide whether the State has established an aggravating circumstance based on the defendant's prior convictions; and (3) *Ring II* requires a jury determination of mitigating circumstances and the weighing and balancing of aggravating and mitigating circumstances. Thus, the court held that there must be a harmless error analysis of findings regarding the existence of mitigation and whether mitigation is sufficient to warrant leniency. *State v. Ring*, 204 Ariz. 534, at ¶¶ 50, 63, 88–89, 65 P.3d 915 (*Ring III*).

On May 6, 2003, the Arizona Supreme Court applied *Ring III* to this case, vacating the death penalty and remanding for resentencing on the murder conviction. *State v. Phillips*, 67 P.3d 1228 (Ariz. 2003). The Arizona Supreme Court held that one of the aggravating circumstances (25 prior convictions for a serious offense) fell outside the purview of *Ring II*, and affirmed the trial court's finding of that aggravating circumstance. *Id.* at ¶¶ 4–5. However, the court went on to hold that a reasonable jury might not have found that Phillips' participation in the murder was motivated by the desire for pecuniary gain, which was the trial court's basis for finding the second aggravating factor. *Id.* at ¶¶ 8–12. In addition, the court ruled that a jury might have found more mitigating factors than the trial court, and

might have found the mitigation sufficiently substantial to call for leniency. *Id.* at ¶¶ 13–14. The Arizona Supreme Court remanded the case for resentencing based on its view that *Ring II* error occurred because the trial judge, not the jury, made findings regarding the mitigating circumstances and determined that the mitigating circumstances were not sufficiently substantial to warrant leniency. *Id.* at ¶ 15.

REASONS WHY THE WRIT SHOULD ISSUE

There is a conflict among the states regarding how to apply *Ring II*. The Arizona, Nevada, and Colorado Supreme Courts have broadly interpreted *Ring II* error to include the determination of mitigating circumstances and the weighing and balancing of aggravation and mitigation. That conclusion conflicts with rulings from courts in Delaware, Nebraska, Oklahoma, Alabama, Indiana, and Florida. This Court should accept review to clarify this confusion regarding the application of *Ring II*.

Ring II should not be interpreted to require a jury, rather than a judge, to find every aggravating circumstance, but only *an* aggravating circumstance that renders a defendant eligible for the death penalty. Likewise, *Ring II* should not be interpreted as establishing a Sixth Amendment right to have a jury determine whether mitigating circumstances exist and whether mitigation is sufficiently substantial to warrant leniency. In *Ring II*, this Court noted that the issue presented was very narrow—whether an aggravating factor that makes a defendant death eligible may be found by the judge, or whether the Sixth Amendment's jury trial guarantee applies to that finding. *Ring II* was based on this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2002), that the jury trial guarantee extends to any fact that increases the sentencing range. In Arizona, a finding of at least one aggravating circumstance necessarily increases the sentencing range to include a possible death sentence. Thus, a jury finding (or a finding of harmless error) regarding the existence of at least one aggravating circumstance extends the sentencing range to include a possible death sentence and therefore satisfies *Ring II*.

Finally, the Arizona Supreme Court's ruling affects not only the instant case, but 26 other Arizona cases that were pending on direct review at the time this Court decided *Ring II*. The State of Arizona has filed a petition for writ of certiorari in *Arizona v Pandeli*, Supreme Court No. 03–15, docketed June 27, 2003, and anticipates that petitions will be filed in other similarly situated cases as the Arizona Supreme Court issues rulings reflecting a harmless error analysis under *Ring II*. This Court should accept review in these cases to avert unwarranted resentencing proceedings, with their concomitant costs to the State and to victims.

ARGUMENTS

I.

THERE IS A CONFLICT AMONG THE STATES REGARDING HOW BROADLY *RING II* SHOULD BE INTERPRETED.

State courts have reached conflicting conclusions regarding the scope of *Ring II*. The Arizona Supreme Court held in the instant case that under *Ring II*, there is a Sixth Amendment right to a jury determination of whether mitigating circumstances exist and whether those circumstances are sufficiently substantial to warrant leniency. *Phillips*, 67 P.3d 1228, at ¶¶ 13–15. The Colorado Supreme Court recently reached the same conclusion in *Woldt v. Colorado*, 64 P.3d 256, 265–66 (Col. 2003), as did the Nevada Supreme Court in *Johnson v. Nevada*, 59 P.3d 450, 458-61 (Nev. 2002).

In contrast, the Delaware Supreme Court recently ruled that *Ring II* does *not* extend to the weighing phase of the capital sentencing process; once a jury finds a statutory aggravating circumstance that renders the defendant death eligible, a sentencing judge may weigh aggravating and mitigating circumstances. *Brice v. Delaware*, 815 A.2d 314, 322 (Del. 2003). The Delaware court expressly rejected the argument that *Ring II* requires the jury to find "every fact" relied on by the sentencing judge in imposing death. 815 A.2d at 321–22. The Nebraska Supreme Court has similarly ruled that *Ring II* does not afford

capital defendants the right to have a jury weigh and balance aggravating and mitigating circumstances; those determinations fall outside the jury's "eligibility" decision and instead are part of the "selection decision," which can be performed by a judge without violating the Sixth Amendment. *State v. Gales*, 658 N.W.2d 604 (Neb. 2003).

Alabama, Oklahoma, Florida, and Indiana courts have similarly rejected the notion that *Ring II* requires that a jury weigh aggravating and mitigating circumstances. In *Lee v. State*, 2003 WL 21480428 (Ala. Crim. App. June 27, 2003), the Alabama Court of Criminal Appeals held that, because the jury convicted the defendant of the capital offenses of robbery-murder, it necessarily found the existence of the statutory aggravating circumstance (committing a murder while engaged in the commission of a robbery or attempted robbery). *Id.* at * 50. The court concluded that *Ring II* was satisfied because a jury, not the judge, determined the existence of an aggravating circumstance rendering the defendant death eligible. *Id.* The Alabama court expressly rejected the defendant's argument that *Ring II* also requires the jury to weigh the aggravating and mitigating circumstances. *Id.* (citing *Ex parte Waldrop*, 2002 WL 1001194 (Ala. Nov. 22, 2002)); *see also Ex parte Hodges v. State*, 2003 WL 1145451, *6, *7 (Ala. Mar. 14, 2003) (upholding judicial-override provision; because the defendant was eligible for the death penalty when the jury found that he committed the murder while he was engaged in a robbery, the subsequent determination by the trial court that the especially heinous, atrocious, or cruel factor was established and that aggravating circumstances outweighed the mitigating circumstances did not implicate *Ring II* or *Apprendi*); *State v. Torres*, 58 P.3d 214 (Crim. App. Okla. 2002) (rejecting claim that *Ring II* precludes an appellate court from reweighing the evidence of aggravating and mitigating circumstances after invalidating an aggravating circumstance: "Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that *Ring [II]* requires."); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) (per curiam opinion analyzing effect of *Ring II* on Florida statutory scheme and denying post-conviction relief based on *Ring II*; two Justices

concurred only because one of the four aggravators found in connection with the murder was Bottoson's prior conviction of a crime involving the threat of violence—an aggravator that need not be found by the jury under *Almendarez-Torres*); *Wrinkles v. State*, 776 N.E.2d 905, 907–08 (Ind. 2002) (multiple murders aggravating circumstance implicit in jury's verdict; therefore *Ring II* is not implicated).

Given the clear conflict in the way state courts have interpreted this Court's Sixth Amendment analysis in *Ring II*, this Court should accept certiorari review to provide guidance and clarity.

II.

THE ARIZONA SUPREME COURT ERRED BY FINDING THAT *RING v. ARIZONA* ESTABLISHES A SIXTH AMENDMENT RIGHT TO HAVE A JURY ASSESS WHETHER MITIGATING CIRCUMSTANCES EXIST AND WHETHER THE MITIGATING CIRCUMSTANCES ARE SUFFICIENT TO WARRANT LENIENCY.

In *Ring II*, this Court held that Arizona's death penalty sentencing statute offended the Sixth Amendment to the extent it required a judge, rather than a jury, to determine the presence or absence of an aggravating circumstance that renders a first-degree murder defendant eligible for the death penalty. Based on *Apprendi*'s holding that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, this Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in which this Court had rejected the same Sixth Amendment challenge to Arizona's statute (A.R.S. § 13–703). *Ring II*, 536 U.S. at 609.

The Arizona Supreme Court has interpreted *Ring II* too broadly. This Court's analysis in *Ring II* focused on whether a finding that an aggravating factor existed *increased the range of sentence* the defendant faced. *See* 536 U.S. at 602. The Arizona Supreme Court had indicated in *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001) (*Ring I*), that "the death sentence becomes possible only after the trial judge

makes a factual finding that *at least one* aggravating factor is present." (Emphasis added.)

Relying on the Arizona Supreme Court's interpretation of Arizona law, this Court found that Arizona's first-degree murder statute authorized a maximum penalty of death "only in a formal sense." This Court stated:

> A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that *a statutory aggravating factor exists*. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.
>
> . . .
>
> Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. This was so because, in Arizona, a "death sentence may not legally be imposed . . . unless *at least one aggravating factor* is found to exist beyond a reasonable doubt."

536 U.S. at 596 (internal quotes omitted, emphasis added). This Court thus held that "the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." 536 U.S. at 604 (quoting *Apprendi*, 530 U.S. at 494).

Apprendi similarly focused on whether a court could impose a sentence *beyond the range* authorized by the jury's verdict. Apprendi pled guilty to possession of a firearm for an unlawful purpose, a crime designated in New Jersey's substantive criminal statute as a second-degree offense, punishable under New Jersey's felony sentencing statute by a 5 to 10 year prison term. *Apprendi*, 530 U.S. at 468–70. The charging instrument made no reference to a third New Jersey statute aimed at hate crime, which enhanced the sentencing range from

the second-degree to first-degree level (from 10 to 20 years) upon a finding by the sentencing court (by a preponderance of the evidence) that the defendant committed the crime with a racially biased purpose. *Id.* at 469. The New Jersey trial court made such a finding and imposed a 12-year sentence, which two state appellate courts subsequently upheld. *Id.* at 471.

This Court determined that Apprendi had a constitutional right to a jury finding on the issue of racial bias, and held that enhancement under New Jersey's hate crime statute violated the Sixth Amendment right to a jury trial because it effectively convicted Apprendi of a greater, uncharged offense. *Id.* at 475–76, 494 n.19. Confirming a principle previously set forth in *Jones (Nathaniel) v. United States*, 526 U.S. 227 (1999), this Court stated:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

Apprendi, 530 U.S. at 490 (citing *Jones*, 526 U.S. at 252–53). This Court was careful to point out, however, that not every factual determination relating to sentencing need be found by a jury:

> We should be clear that nothing in this [common-law] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case. *See e.g., Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949) . . . .

530 U.S. at 481 (emphasis in original).

In the consolidated proceedings conducted by the Arizona Supreme Court following *Ring II*, the State argued that the court should uphold capital sentences imposed under Arizona's disapproved, former statute in three circumstances: (1) where the jury implicitly found one aggravating factor, (2) where the trial judge found one factor established by overwhelming and essentially uncontroverted evidence, or (3) where the aggravator was outside the purview of *Ring II*. Any one of these findings renders the defendant "death eligible" based on the presence of one aggravating factor without offending *Ring II*. The State posited that nothing in *Ring II* prevented a trial judge from finding the second and succeeding aggravating circumstances, as well as finding mitigating circumstances and balancing them against the aggravating circumstances.

The Arizona Supreme Court rejected the State's argument. The court acknowledged that "[a] narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors," but nevertheless concluded that *Ring II* requires a jury to consider all aggravating factors urged by the State. The Arizona Supreme Court further noted that the death penalty could not have been imposed under the statute in place when the defendants, including Phillips, were sentenced unless the trial court, acting as the sentencer, concluded that mitigating factors were not sufficiently substantial to call for leniency. The court thus held that an analysis of *Ring II* error includes a determination of the mitigating circumstances and whether those circumstances outweigh the aggravating circumstances. *Ring III*, 65 P.3d 915, ¶¶ 88–89, *Phillips*, 67 P.3d 1228, ¶ 15.

The Arizona Supreme Court's expansive reading of *Ring II* is unwarranted given the narrow scope of the issue addressed in *Ring II*:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring

> therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. *See Apprendi v. New Jersey*, 530 U.S. 466, 490-491, n. 16, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (noting "the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation" (citation omitted)). Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty. *See Proffitt v. Florida*, 428 U.S. 242, 252, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) ("[I]t has never [been] suggested that jury sentencing is constitutionally required."). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. *See Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

536 U.S. at 597 n.4.

Furthermore, both *Ring II* and *Apprendi* focused exclusively on a Sixth Amendment requirement that the jury make factual findings that set the outer limits of the sentencing *range*. Neither case established a Sixth Amendment basis for requiring a jury to make the ultimate sentencing decision; such a requirement was urged only by Justice Breyer in a concurring opinion. *Ring II*, 536 U.S. at 614 (J. Breyer, concurring based on his belief that the Eighth Amendment mandates jury sentencing in capital cases). Thus, when a state court finds that an aggravating circumstance is outside the purview of *Ring II*, or that *Ring II* error relating to one aggravating circumstance is harmless, that finding satisfies the Sixth Amendment requirements set forth in *Ring II* and *Apprendi*. *See Brice v. Delaware*, 815 A.2d at 321–22 (*Ring II* requires only that a jury find the existence of an aggravating circumstance necessary for imposition of the death penalty).

In the present case, the Arizona Supreme Court expressly found that there was no error with regard to the prior convictions aggravator (25 convictions) under the rationale set forth in *Almendarez-Torres*. *Phillips*, 67 P.3d 1228, ¶ 5. That ruling satisfied *Ring II*, and there was no need for an analysis of whether error relating to the lack of a jury finding regarding a second aggravator or the weighing of aggravation and mitigation was harmless.

This Court's decision in *United States v. Harris*, 536 U.S. 545 (2002), decided the same day as *Ring II*, supports the conclusion that the finding of any one aggravating circumstance satisfies the Sixth Amendment requirement set forth in *Ring II*. In *Harris*, this Court rejected a claim that the Sixth Amendment requires a jury finding of facts increasing the statutory minimum sentence. The trial court sentenced the defendant to a mandatory 7-year minimum sentence based on its own finding that the defendant brandished a gun. 536 U.S. at 551. The defendant argued that, in light of *Apprendi*, he could not receive a sentence based on brandishing a weapon without a jury finding to that effect. *Id.* This Court observed that, unlike a statutory factor that increases the maximum penalty for the defendant's crime, a statutory factor setting a mandatory minimum "ha[s] an effect on the defendant's sentence that is more consistent with traditional understandings about how sentencing factors operate; the required findings constrain, rather than extend, the sentencing judge's discretion." 536 U.S. at 554. This Court further noted that the brandishing statute "does not authorize the judge to impose 'steeply higher penalties'—or higher penalties at all—once the facts in question are found." *Id.*

This Court also reiterated its pronouncement in *Jones* that "[i]t is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." *Harris*, 536 U.S. at 558 (citing *Jones*, 526 U.S. at 248). This Court then held that "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment,

jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Id.*

In the present case, findings regarding mitigation likewise operated to "constrain, rather than extend, the sentencing judge's discretion." Once the sentencing range included a possible death sentence based on the presence of at least one statutory aggravating circumstance, there was no *Ring II/Apprendi* error when the trial court or the Arizona Supreme Court balanced aggravating and mitigating circumstances. *See also Zant v. Stephens*, 462 U.S. 862 (1983) (holding that in a state where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury).

Finally, *Ring II* error should be narrowly interpreted because it does not go to the fairness or reliability of the sentencing process. The sentencing error in *Ring II* and in the instant case was that a fair and impartial judge, rather than a fair and impartial jury, determined the existence of aggravating circumstances under A.R.S. § 13–703. The error at issue did not implicate the fundamental fairness of the process, and there is not a compelling basis for broadening this Court's holding in *Ring II* beyond the scope of that decision.

In *United States v. Cotton*, 535 U.S. 625, 632–34 (2002), this Court noted the injustice that would result if a sentence were to be reversed based on error that "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." Such an injustice will occur in the instant case if a resentencing proceeding is required. Given the Arizona Supreme Court's conclusion that no *Ring II* error arose from the finding of the prior conviction aggravator, there is no inherent unfairness to the defendant in ending the harmless error inquiry there. The real threat to the "fairness, integrity, and public reputation of judicial proceedings" would be to require a resentencing in this case notwithstanding a finding of harmlessness with respect to

an aggravating factor that set the outer limits of the sentencing range to include a possible death sentence.

CONCLUSION

There is a conflict among the states regarding whether, under *Ring II*, the Sixth Amendment jury trial guarantee is satisfied in a capital case when there is a jury finding (or a finding of harmless error) relating to the existence of an aggravating circumstance that makes the defendant eligible for the death penalty. This Court should accept certiorari review to address that conflict and to reject the Arizona Supreme Court's finding that the Sixth Amendment requires a jury finding regarding every aggravating circumstance and a jury determination of whether mitigating circumstances exist and whether the mitigation is sufficiently substantial to warrant leniency. Accordingly, and based on the foregoing authority and arguments, the State of Arizona respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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CRM99-1029
114489

APPENDIX A

[Filed May 6, 2003]

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-99-0296-AP
Appellee,	)	
	)	Pima County Superior Court
v.	)	No. CR-61452
	)	
KEITH ROYAL PHILLIPS	)	SUPPLEMENTAL OPINION
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Pima County
The Honorable Bernardo P. Velasco, Judge

REMANDED FOR RESENTENCING

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B E R C H, Justice

¶1 Keith Phillips was sentenced to death under a procedure found unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428

(2002) (*Ring II*). In *Ring II*, the Supreme Court held that Arizona's capital sentencing scheme violated the defendant's Sixth Amendment right to a jury trial.[1] *Id.* at 609, 122 S. Ct. at 2443. In doing so, the Court held that defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S. Ct. at 2432. The Court remanded for further proceedings consistent with its decision. *Id.* at 609, 122 S. Ct. at 2443.

¶2 On remand, we consolidated all cases, including Phillips', in which the death penalty had been imposed and the mandate had not yet issued from this court, to determine whether *Ring II* requires reversal or vacatur of the death sentences in these cases. *State v. Ring*, ___ Ariz. ___, ___, ¶¶ 5-6, 65 P.3d 915, 925 (2003) (*Ring III*). We concluded that we must review each death sentence imposed under Arizona's superseded capital sentencing statutes for harmless error. *Id.* at ___, ¶ 53, 65 P.3d at 936. This is that review in Phillips' case.

FACTS AND PROCEDURAL HISTORY

¶3 On March 1, 1999, a jury found Keith Phillips guilty of two counts of attempted murder, and forty-five counts of armed robbery, kidnapping, and aggravated assault, all stemming from three separate robberies that occurred over a sixteen-day period in April, 1998. *See State v. Phillips*, 202 Ariz. 427, 431, ¶ 1, 46 P.3d 1048, 1052 (2002). Phillips was also convicted of premeditated and felony murder for a homicide committed by his partner, Marcus Finch, during the third robbery. *Id.* at 431-32, ¶¶ 1, 9, 46 P.3d at 1052-53. Following the jury's verdict, the trial judge conducted a sentencing hearing in which he found beyond a reasonable doubt that Phillips expected pecuniary gain as the result of the murder and that he was guilty of prior serious offenses, aggravating circumstances rendering Phillips eligible for the

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1. The legislature has since amended the statute requiring judge-sentencing in capital. Cases. *See* 2002 Ariz. Sess. Laws, 5th Spec. Sess. Ch. 1, § 1.

death sentence. *Id.* at 433, ¶ 15, 46 P.3d at 1054; Ariz. Rev. State. ("A.R.S.") § 13-703(F)(2), (F)(5) (Supp. 1998). After reviewing the mitigating circumstances Phillips presented at the sentencing hearing, the judge concluded "that either of the two aggravating circumstances was sufficient in itself to outweigh the mitigation." *Phillips*, 202 Ariz. at 433, ¶ 15, 46 P.3d at 1054. On appeal, we vacated Phillips' conviction of premeditated murder but affirmed all of the other convictions and sentences. *Id.* at 441, ¶ 83, 446 P.3d at 1062. We now review whether, in light of *Ring II* and *Ring III*, the death sentence imposed on Phillips can stand.

DISCUSSION

A. Aggravating Circumstances

1. Prior serious offense

¶4 Arizona law lists as an aggravating circumstance whether "[t]he defendant was previously convicted of a serious offense, whether preparatory or competed." A.R.S. § 13–703(F)(2). The trial judge found that Phillips had been convicted of prior serious offenses, armed robbery and aggravated assault, in 1998. *Phillips*, 202 Ariz. at 438-39, ¶ 57, 46 P.3d at 1059-60. Further, the judge determined that the twenty-five convictions for armed robbery, aggravated assault, and kidnapping committed during the first two robberies in the series of robberies at issue also constituted prior serious offenses.[2] *Id.*

¶5 In *Ring III*, we held "that the Sixth Amendment does not require a jury to determine prior convictions under sections 13-703.F.1

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2. The trial judge also considered the armed robbery, kidnapping, and aggravated assault charges from the third robbery in his (F)(2) finding. *Phillips*, 202 Ariz. at 438-39, ¶ 57, 46 P.3d at 1059-60. This court held that the trial court erred in considering the charges from the third robbery, but found the error harmless because Phillips' 1998 convictions as well as the convictions from the first two robberies satisfied the (F)(f2) circumstance. *Id.* ¶¶ 56-57.

and F.2." ___ Ariz. ___-___, ¶ 55, 65 P.3d at 936-37. Accordingly, we will not disturb the trial judge's finding that the aggravating circumstance of prior serious offenses was proved, rendering Phillips eligible for the death sentence.

2. Pecuniary gain

¶6 Arizona law makes commission of an offense "in expectation of the receipt . . . of anything of pecuniary value" an aggravating circumstance. A.R.S. § 13–703(F)(5). A finding of pecuniary gain does not automatically follow each time a robbery results in murder; rather, the inquiry is highly fact intensive. *Ring III*, ___ Ariz. at ___, ¶¶ 76-77, 65 P.3d at 941.

¶7 The trial judge found that the State proved beyond a reasonable doubt that the murder was motivated by Phillips' desire "to obtain money to buy drugs," a pecuniary motive. This finding fulfills the requirement that "the state must prove that the murder would not have occurred but for the defendant's pecuniary motive." *Id.* ¶ 75 (citing *State v. Harding*, 137 Ariz. 278, 296-97, 670 P.2d 383, 394-95 (1983)). We affirmed the pecuniary gain factor on appeal. *Phillips*, 202 Ariz. at 438, ¶ 55, 46 P.3d at 1059.

¶8 Because the finding of pecuniary gain is so fact-intensive, however, we cannot affirm a pecuniary gain finding unless we are convinced beyond a reasonable doubt that no reasonable jury could find that the State *failed* to prove pecuniary gain beyond a reasonable doubt. *See Ring III*, ___ Ariz. at ___, ¶¶ 76-79, 65 P.3d at 941. Only in such a case will we find harmless error regarding that factor. *Id.* ¶ 79.

¶9 This court has held that pecuniary gain is an aggravating factor if "a murder was committed to hinder detection" of a continuing robbery. *State v. Lee*, 185 549, 558, 917 P.2d 692, 701 (1996); *see also State v. Rockwell*, 161 Ariz. 5, 14, 775 P.2d 1069, 1078 (1989) (holding that if a witness was eliminated to facilitate the theft, "the murder was

part and parcel of the robbery"). The trial judge determined that the murder was motivated by pecuniary gain because "Finch shot and killed Hendricks during the course of that felony so he and Phillips could successfully complete the robbery without detection." *Phillips*, 202 Ariz. at 437, ¶ 44, 46 P.3d at 1058 (referencing special verdict).

¶10 Next the judge determined that Phillips *participated* in the murder for pecuniary gain.[3] *Phillips*, 202 Ariz. at 438, ¶ 53, 46 P.3d at 1059. The trial judge relied on evidence presented at trial that, to get the patrons' attention, Phillips fired his weapon in a dangerous manner upon entering the restaurant where the third robbery took place. This, the judge concluded, showed that Phillips commenced the robbery "with murder in his heart or, at the least, with indifference to human life such that death would occur before any money was obtained." This evidence supports the finding of felony murder, which requires that a defendant have intended to commit the underlying enumerated felony, and, "in furtherance of that offense, cause[d] the death of any person." A.R.S. § 13–1105(A)(2) (2001). But because there was little evidence as to Phillips' intent and motivation regarding Finch's killing of Hendricks, we cannot say that a jury would be unreasonable to conclude that Phillips' participation in the murder was motivated by something other than pecuniary gain.

¶11 Finch, the shooter, killed the victim to avoid detection and further the robbery. *See Phillips*, 202 Ariz. at 437, ¶ 44, 46 P.3d at 1058. The evidence is not so clear, however, that Phillips shared Finch's motivation. The Supreme Court has said that in a capital case based on felony murder, the punishment must reflect the defendant's own culpability, not that of the person who did the actual killing.

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3. We bear in mind that when the trial judge was making this determination, Phillips still stood convicted of both felony and premeditated murder. It is impossible to say whether his analysis would have differed had Phillip stood convicted only of felony murder at his sentencing.

Enmund v. Florida, 458 U.S. 782, 798, 102 S. Ct. 3368, 3377 (1982).

¶12 While on remand a jury may well conclude that Phillips participated in the crime for pecuniary gain, we cannot say beyond a reasonable doubt that it would so conclude. *See State v. Fulminante*, 161 Ariz. 237, 245, 778 P.2d 602, 610 (1988) (holding that the error is harmless if the court can determine, beyond a reasonable doubt, that error did not affect the verdict).

B. Mitigating Circumstances

¶13 To sentence a defendant to death, not only must the trier of fact find, beyond a reasonable doubt, the existence of one or more aggravating circumstances, but it must also consider whether any mitigating circumstances are sufficiently substantial to call for leniency. *See* A.R.S. § 13–703(E) (Supp. 2002). *Ring III* allows us to "affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact wold determine that the mitigating circumstances were sufficiently substantial to call for leniency." ___ Ariz. at ___, ¶ 104, 65 P.3d at 946.

¶14 Phillips offered more than ten mitigating circumstances for the court's consideration. The trial judge found only two mitigators,[4] and he did not find their weight sufficient to call for leniency. After reviewing the evidence, we cannot say that a reasonable jury would not have found additional mitigating factors or weighed differently the mitigating factors that were found. Furthermore, we cannot say beyond a reasonable doubt that if a jury had found additional mitigating circumstances or weighed the mitigating circumstances differently, it would not have found them "sufficiently substantial to call for leniency." A.R.S. § 13-703(E).

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4. The special verdict reflects that the judge found two mitigating factors; the reported opinion reflects that one was found. See Special Verdict at 5; Phillips, 202 Ariz. at 433, ¶ 15, 46 P.3d at 1054. We need not resolve this discrepancy because this issue will be re-tried.

CONCLUSION

¶15 Accordingly, because we cannot say that the sentencing procedure used here resulted in harmless error, we vacate Phillips' death sentence and remand for resentencing under A.R.S. section 13-703 and 13-703.01 (Supp. 2002).

Rebecca White Berch, Justice

CONCURRING:

Ruth V. McGregor, Vice Chief Justice

Michael D. Ryan, Justice

J O N E S, C.J., concurring in part, dissenting in part:

¶16 I concur in the result, but dissent from the majority's conclusion that harmless error analysis is appropriate where sentencing determinations are made by the trial judge in the absence of the jury. The right to trial by an impartial jury is fundamental. The sentencing phase is, of itself, a life or death matter. Where a judge, not a jury, determines all questions pertaining to sentencing, I believe a violation of the Sixth Amendment to the Constitution of the United States has occurred. In the aftermath of the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002) (*Ring II*), the absence of the jury in the sentencing phase of a capital trial necessarily amounts to structural error. I would remand the case for resentencing, simply on the basis of the Sixth Amendment violation. *See State v. Ring*, ___ Ariz. ___, ___ ¶¶ 105-14, 65 P.3d 915, 946-48 (2003) (Feldman J., concurring in part, dissenting in part) (*Ring III*).

Charles E. Jones, Chief Justice

APPENDIX B

[Filed April 3, 2003]

SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, v. TIMOTHY STUART RING, Appellant.	Arizona Supreme Court No. CR-97-0428-AP Maricopa County Superior Court No. CR-95-01754(A) CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. ANTOIN JONES, Appellant.	Arizona Supreme Court No. CR-99-0536-AP Maricopa County Superior Court No. CR-96-04691 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. DANNY N. MONTAÑO, Appellant.	Arizona Supreme Court No. CR-99-0439-AP Pima County Superior Court No. CR-58016 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. WAYNE BENOIT PRINCE, Appellant.	Arizona Supreme Court No. CR-00-0328-AP Maricopa County Superior Court No. CR 98-04885 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. MICHAEL GENE BLAKLEY, Appellant.	Arizona Supreme Court No. CR-00-0360-AP Mohave County Superior Court No. CR-98-838 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. HENRY WILLIAM HALL, Appellant.	Arizona Supreme Court No. CR-00-0447-AP Maricopa County Superior Court No. CR1997-011695 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. SHAWN RYAN GRELL, Appellant.	)	Arizona Supreme Court No. CR-01-0275-AP Maricopa County Superior Court No. CR1999-095294 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. JAMES EDWARD DAVOLT, II, Appellant.	)	Arizona Supreme Court No. CR-00-0508-AP Mohave County Superior Court No. CR-98-1243 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. LEROY D. CROPPER, Appellant.	)	Arizona Supreme Court No. CR-00-0544-AP Maricopa County Superior Court No. CR97-03949 CONSOLIDATED WITH

STATE OF ARIZONA, Appellee, v. SHAD DANIEL ARMSTRONG, Appellant.	)	Arizona Supreme Court No. CR-00-0595-AP Pima County Superior Court No. CR-61846 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. EUGENE ROBERT TUCKER, Appellant.	)	Arizona Supreme Court No. CR-01-0091-AP Maricopa County Superior Court No. CR1999-015293 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. KAJORNSAK PRASERTPHONG, Appellant.	)	Arizona Supreme Court No. CR-01-0100-AP Pima County Superior Court No. CR-64663 CONSOLIDATED WITH
STATE OF ARIZONA,	)	Arizona Supreme Court No. CR-01-0103-AP

Appellee,	)	
	)	Pima County Superior
v.	)	Court
	)	No. CR-64663
CHRISTOPHER BO HUERSTEL,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-01-0129-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1997-05555
SHERMAN LEE RUTLEDGE,	)	
	)	
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-01-0270-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1996-011714
CHRISTOPHER GEORGE THEODORE LAMAR,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-01-0421-AP

Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR1995-006472
MICHAEL JOE MURDAUGH (A),	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-02-0042-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR-1999-003536
BRIAN JEFFREY DANN,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-02-0044-AP
Appellee,	)	
	)	Pima County Superior
v.	)	Court
	)	No. CR-43804
ROBERT JOE MOODY,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-99-0296-AP
Appellee,	)	

	)	Pima County Superior
v.	)	Court
	)	No. CR-61452
KEITH ROYAL PHILLIPS,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-99-0551-AP
Appellee,	)	
	)	Pima County Superior
v.	)	Court
	)	No. CR-61452
MARCUS LASALLE FINCH,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-99-0438-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR-98-003520
JOHN EDWARD SANSING,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-98-0289-AP
Appellee,	)	
	)	Maricopa County Superior

v.	)	Court
	)	No. CR-95-09046
JAMES CORNELL HARROD,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-98-0376-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR-93-08116
DARREL PETER PANDELI aka DARREL PETER FLORIAN,	)	
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Appellant.	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-97-0317-AP
Appellee,	)	
	)	Maricopa County Superior
v.	)	Court
	)	No. CR 92-05731
SCOTT ALAN LEHR,	)	
	)	CONSOLIDATED WITH
Appellant.	)	
	)	
	)	
STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-98-0488-AP
Appellee,	)	
	)	Pinal County Superior
v.	)	Court

ARTURO ANDA CAÑEZ, Appellant.	)	No. CR-96-021235 CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. AARON SCOTT HOSKINS, Appellant.	)	Arizona Supreme Court No. CR-97-0349-AP Maricopa County Superior Court Nos. CR-94-11396 and CR-94-11397 (Consolidated) CONSOLIDATED WITH
STATE OF ARIZONA, Appellee, v. SCOTT DOUGLAS NORDSTROM, Appellant.	)	Arizona Supreme Court No. CR-98-0278-AP Pima County Superior Court No. CR-55947 **OPINION**

Appeal from the Superior Court of Maricopa County
No. CR-95-01754(A)
The Honorable Gregory H. Martin, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-96-04691
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Pima County
No. CR-58016
The Honorable Deborah J. S. Ward, Judge Pro Tempore

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Appeal from the Superior Court of Maricopa County
No. CR 98-04885
The Honorable Michael R. McVey, Judge

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Appeal from the Superior Court of Mohave County
No. CR-98-838
The Honorable Steven F. Conn, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1997-011695
The Honorable Thomas W. O'Toole, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1999-095294
The Honorable Barbara M. Jarrett, Judge

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Appeal from the Superior Court of Mohave County
No. CR-98-1243
The Honorable Steven F. Conn, Judge

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Appeal from the Superior Court of Maricopa County
No. CR97-03949
The Honorable David R. Cole, Judge

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Appeal from the Superior Court of Pima County
No. CR-61846

The Honorable Howard Hantman, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1999-015293
The Honorable Michael D. Jones, Judge

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Appeal from the Superior Court of Pima County
No. CR-64663
The Honorable Michael Brown, Judge

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Appeal from the Superior Court of Pima County
No. CR-64663
The Honorable Michael Brown, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1997-05555
The Honorable Frank T. Galati, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1996-011714
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Maricopa County
No. CR1995-006472
The Honorable Sherry Hutt, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 1999-003536
The Honorable H. Jeffrey Coker, Judge

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Appeal from the Superior Court of Pima County
No. CR-43804
The Honorable Michael Cruikshank, Judge

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Appeal from the Superior Court of Pima County
No. CR-61452
The Honorable Bernardo P. Velasco, Judge

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Appeal from the Superior Court of Pima County
No. CR-61452
The Honorable Bernardo P. Velasco, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 98-003520
The Honorable Ronald S. Reinstein, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-95-09046
The Honorable Ronald S. Reinstein, Judge

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Appeal from the Superior Court of Maricopa County
No. CR-93-08116
The Honorable Gregory H. Martin, Judge

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Appeal from the Superior Court of Maricopa County
No. CR 92-05731
The Honorable Stephen A. Gerst, Judge

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Appeal from the Superior Court of Pinal County
No. CR-96-021235
The Honorable Boyd T. Johnson, Judge

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Attorneys for Arturo Anda Cañez

Appeal from the Superior Court of Maricopa County
Nos. CR-94-11396 and CR-94-11397 (Consolidated)
The Honorable Jeffrey A. Hotham, Judge

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Appeal from the Superior Court of Pima County
No. CR-55947
The Honorable Michael Cruikshank, Judge Pro Tempore

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M c G R E G O R, Vice Chief Justice

¶1 This case comes to us on remand from the United States Supreme Court, *Ring v. Arizona*, 536 U.S. 584, ___, 122 S. Ct. 2428, 2443 (2002) (*Ring II*). We have jurisdiction pursuant to the Arizona Constitution, Article VI, Section 5.3.

I.
Facts and Procedural History.

¶2 On December 6, 1996, a jury convicted Timothy Stuart Ring of first degree murder, conspiracy to commit armed robbery, armed robbery, burglary and theft. Under Arizona law at the time of Ring's sentencing, capital sentencing followed the procedure set forth at Arizona Revised Statutes (A.R.S.) section 13-703 (Supp. 1996). As required by A.R.S. section 13-703.B, the trial court conducted a sentencing hearing to consider aggravating and mitigating circumstances. The court could consider only those aggravating factors identified by statute, but could

consider any possible mitigating factor.[1] A.R.S. § 13-703.F–.G, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. After the hearing, the court found two aggravating factors: Ring committed the murder for pecuniary gain, A.R.S. section 13-703.F.5, and "in an especially heinous, cruel or depraved manner," A.R.S. section 13-703.F.6. *State v. Ring*, 200 Ariz. 267, 272 ¶ 13, 25 P.3d 1139, 1144 (2001) (*Ring I*). The trial court concluded that the mitigating circumstance of Ring's minimal criminal record was not "sufficiently substantial to call for leniency" and sentenced Ring to death. *Id.* at 273 ¶ 13, 25 P.3d at 1145; *see* A.R.S. § 13-703.E, *amended by* 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶3 Ring subsequently filed a direct appeal to this court seeking review of multiple trial and sentencing issues, including a Sixth Amendment challenge to Arizona's capital sentencing procedure. The Sixth Amendment right to a jury trial, Ring argued, requires a jury, rather than a judge, to find the aggravating factors set forth at section 13-703.F. *Ring I,* 200 Ariz. at 278 ¶ 40, 25 P.3d at 1150. This court affirmed Ring's first degree murder conviction and death sentence. *Id.* at 284 ¶ 65, 25 P.3d at 1156. Guided by the United States Supreme Court's decision in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), we held Arizona's capital sentencing procedure did not violate the Sixth Amendment of the United States Constitution. *Ring I*, 200 Ariz. at 279-80 ¶ 44, 25 P.3d at 1151-52.

¶4 Ring petitioned the United States Supreme Court to accept

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[1] The state must prove aggravating factors beyond a reasonable doubt. A.R.S. § 13-703.B (Supp. 2002); *State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). Mitigating factors must be proved by a preponderance of the evidence. A.R.S. § 13-703.C; *State v. Pandeli*, 200 Ariz. 365, 376 ¶ 44, 26 P.3d 1136, 1147 (2001). Except for one brief period, aggravating circumstances have been codified at A.R.S. section 13-703.F since the legislature enacted judge-based sentencing. Following the 2001 Arizona Legislative Session, these aggravating circumstances are listed under A.R.S. section 13-703.G. 2001 Ariz. Sess. Laws ch. 260, § 1. The legislature redesignated aggravating circumstances under subsection .F in its post-*Ring II* amendments. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

certiorari. The Court granted review and held that Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial, overruling *Walton* and applying the approach of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. The Supreme Court remanded the matter for disposition in light of *Ring II*.

¶5 At the time of the *Ring II* decision, thirty-one defendants sentenced to death had matters pending on direct appeal before this court. On June 27, 2002, we entered an order consolidating all thirty-one death penalty cases then on direct appeal. *State v. Ring*, Order No. CR-97-0428-AP (June 27, 2002).

¶6 All defendants in this consolidated case either pled guilty to or were convicted by a jury of first degree premeditated or felony murder. Trial judges sentenced all defendants to death under a now-superseded version of A.R.S. section 13-703, under which a judge considered aggravating and mitigating evidence. This court must now examine the impact of *Ring II* on the death sentences of those defendants before us. To assist the court, and after consultation with counsel for the State and the defendants, we ordered the parties to brief the issues discussed below. We reserved to each defendant the right to further brief sentencing issues, if necessary. This opinion addresses those issues raised in the consolidated appeal. The court will address each defendant's sentencing issues in a separate opinion.

II.

Historical Overview of Capital Punishment in Arizona.

¶7 Under Arizona's first penal code, a person convicted of first degree

murder received either a death or prison sentence.[2] Revised Statutes of Arizona, Penal Code § 173 (1913). The jury, exercising its discretion, decided which punishment to impose. *Id.* In 1918, voters approved an initiative measure giving the trial judge authority to sentence a person to death for first degree murder in cases in which the defendant pled guilty. 1919 Ariz. Sess. Laws, Initiative & Referendum Measures 17, 18. In those cases, the trial court exercised the same discretion as did a jury. Thus, until the early 1970s, Arizona imposed the death penalty for first degree murder at the sole discretion of the jury or court. *E.g.*, Ariz. Code § 43-2903 (1939); Ariz. Code § 4585 (1928); *State v. McGee*, 91 Ariz. 101, 111-12, 370 P.2d 261, 268 (1962) ("The determination of punishment is wholly within the discretion of the jury upon their consideration of all aspects of the case."), *superseded by statute as stated in State v. Lopez*, 163 Ariz. 108, 115, 786 P.2d 959, 966 (1990); *Hernandez v. State*, 43 Ariz. 424, 429, 32 P.2d 18, 20 (1934) ("[T]he question of punishment in first degree murder cases is wholly within the jury's discretion . .. ."). No statutory standards guided the determination of punishment.

¶8 In 1972, however, the United States Supreme Court decided *Furman v. Georgia* and held that standardless death sentencing procedures violate the Eighth Amendment's prohibition of cruel and unusual punishment. 408 U.S. 238, 239-40, 92 S. Ct. 2726, 2727 (1972) (per curiam). According to Justice Stewart, complete jury discretion led to arbitrary and capricious imposition of the death sentence; given strikingly similar crimes, some defendants received a death sentence and others did not. *Id.* at 309-10, 92 S. Ct. at 2762 (Stewart, J., concurring).

¶9 Following the *Furman* decision, the Arizona Legislature enacted a new capital sentencing scheme. 1973 Ariz. Sess. Laws ch. 138. The legislation divided a capital first degree murder trial into two phases: a

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[2] In addition to first degree murder, offenses punishable by death included treason, Revised Statutes of Arizona, Penal Code section 33 (1913), train robbery, *id.* sections 435, 438, and deadly assault by a felon serving a life sentence, *id.* section 220.

guilt phase and a sentencing phase. Upon a jury conviction of or a guilty plea to first degree murder, the statutes required the trial court to hold a sentencing hearing at which the state and defendant presented evidence of statutorily defined aggravating and mitigating factors.[3] *Id.* § 5. The trial court could impose the death sentence if it found at least one aggravating circumstance and "no mitigating circumstances sufficiently substantial to call for leniency." *Id.*

¶10 Three years later, in *Gregg v. Georgia*, the Supreme Court upheld Georgia's revised sentencing scheme against a claim that the death penalty was *per se* unconstitutional. 428 U.S. 153, 169, 96 S. Ct. 2909, 2923 (1976). The Georgia statute resembled Arizona's, except that, under Georgia law, the same jury heard both the guilt and sentencing phases. *See id.* at 164 & n.9, 96 S. Ct. at 2921 & n.9.

¶11 The Supreme Court reviewed Arizona's judge-only sentencing in *Walton*. The Court rejected an argument that the Sixth Amendment right to a jury trial required a jury, not a judge, to find the facts presented at the sentencing hearing. *Walton*, 497 U.S. at 649, 110 S. Ct. at 3055. In *Apprendi*, a non-capital case decided ten years later, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. Although Justice O'Connor's *Apprendi* dissent questioned whether *Walton* could survive the *Apprendi* ruling, *id.* at 537, 120 S. Ct. at 2387-88 (O'Connor, J., dissenting), the majority distinguished capital cases as "not controlling" authority. *Id.* at 496-97, 120 S. Ct. at 2366.

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[3] In 1978, the Supreme Court held unconstitutional those death penalty sentencing statutes limiting the types of mitigating evidence a defendant can introduce. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978); *Bell v. Ohio*, 438 U.S. 637, 642, 98 S. Ct. 2977, 2980-81 (1978). This court subsequently held unconstitutional Arizona's exclusion of nonstatutory mitigating circumstances. *State v. Watson*, 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978). In 1979, the Arizona Legislature amended the mitigating circumstances statute to conform with these decisions. 1979 Ariz. Sess. Laws ch. 144, § 1.

¶12 Finally, in *Ring II*, the Supreme Court expressly overruled *Walton* in favor of *Apprendi*'s Sixth Amendment approach. 536 U.S. at ___, 122 S. Ct. at 2443. According to the Court, "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19, 120 S. Ct. at 2365 n.19). "Capital defendants, no less than non-capital defendants," the Court concluded, "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at ___, 122 S. Ct. at 2432. Thus, any fact necessary to enhance the defendant's sentence beyond that authorized by the jury's guilty verdict must be found by the jury.

¶13 Following the Supreme Court's announcement of the *Ring II* decision, Governor Jane Dee Hull called a special legislative session to revise Arizona's capital sentencing provisions. On August 1, 2002, the legislature passed and Governor Hull signed into law Senate Bill ("S.B.") 1001, containing several revisions intended to conform Arizona law to the *Ring II* mandate. S.B. 1001, 45th Leg., 5th Spec. Sess. (Ariz. 2002). Under Arizona's amended sentencing procedure, the jury serving during the guilt phase of the trial also serves as the trier of fact during the sentencing phase. A.R.S. § 13-703.01.C–.D (Supp. 2002). Specifically, the jury will find and consider the effect of aggravating and mitigating circumstances and decide whether the defendant should receive a sentence of death. *Id.* § 13-703.01.D.

¶14 To determine whether we should vacate defendants' death sentences and either reduce to a life sentence or remand for resentencing under Arizona's revised procedure, we consider the following issues.

III.

Does the Ex Post Facto Clause Prohibit Resentencing Under Arizona's Amended Capital Sentencing Procedure?

¶15 The defendants argue that resentencing under A.R.S. sections 13-

703 and 13-703.01 (Supp. 2002) (the new sentencing statutes) would constitute an ex post facto violation under the United States Constitution, Article I, Section 10, Clause 1, and the Arizona Constitution, Article II, Section 25. We disagree.[4]

¶16 The ex post facto doctrine prohibits a state from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S. Ct. 2715, 2719 (1990). In *Dobbert v. Florida*, the Supreme Court held that ex post facto prohibitions reach only those legislative enactments that affect substantive criminal law. 432 U.S. 282, 292, 97 S. Ct. 2290, 2298 (1977). Likewise, we recently held that, under the United States and Arizona Constitutions, "[a]n *ex post facto* law is one that increases the punishment or aggravates any crime previously committed." *Zuther v. State*, 199 Ariz. 104, 111 ¶ 26, 14 P.3d 295, 302 (2000) (holding legislative amendment changing statutory computation of prisoner "gate money" not an ex post facto law because legislative purpose was not punitive).

¶17 In *Dobbert*, the Supreme Court restated the categories of laws constituting substantive changes to criminal law:

> [A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

432 U.S. at 292, 97 S. Ct. at 2298 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 68 (1925)). Thus, a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the Ex Post Facto Clause. *Collins*, 497 U.S. at 45, 110 S. Ct. at 2720 ("[Procedural] refers

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[4] In *State v. Noble*, we held that we will interpret the state Ex Post Facto Clause in accord with federal precedent. 171 Ariz. 171, 173, 829 P.2d 1217, 1219 (1992). We find no reason to deviate from *Noble*.

to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes."); *State v. Mendoza*, 170 Ariz. 184, 193, 823 P.2d 51, 60 (1992) ("A defendant has no vested right in any particular mode of procedure.").

¶18 The question before us, then, is whether Arizona's new sentencing statutes worked a substantive or procedural change in the law as it existed when these murders took place. We regard three decisions as particularly instructive.

¶19 In *Dobbert*, the defendant argued that his death sentence violated the Ex Post Facto Clause. Dobbert killed his children in 1972. At that time, Florida mandated a death sentence for capital felony convictions unless the jury, in its discretion, recommended mercy to the judge. *Dobbert*, 432 U.S. at 287, 97 S. Ct. at 2295. Shortly after Dobbert murdered his children, the Supreme Court decided *Furman v. Georgia*, striking down the Georgia death sentencing statute as unconstitutional. *Id.* at 288, 97 S. Ct. at 2296. A month later, in *Donaldson v. Sack*, the Florida Supreme Court held the Florida death sentencing statute unconstitutional under *Furman*. 265 So. 2d 499, 501 (Fla. 1972). Later that year, the Florida Legislature amended the state's capital sentencing procedure to comply with *Furman* and *Donaldson*. *Dobbert*, 432 U.S. at 288, 97 S. Ct. at 2296. Dobbert was then tried and sentenced to death under the state's new law. *Id.* at 284, 97 S. Ct. at 2294.

¶20 Dobbert failed to persuade the Supreme Court that sentencing him under the amended procedures violated the Ex Post Facto Clause. The Court first limited ex post facto violations to those occurring when a statute makes criminal a previously innocent act, aggravates a crime previously committed, provides greater punishment, or changes the quantum of proof needed to convict a defendant. *Id.* at 292, 97 S. Ct. at 2298 (quoting *Beazell*, 269 U.S. at 169-70, 46 S. Ct. at 68). None of those categories applied to the Florida statute. Instead, the Court concluded, the statutory change between the two sentencing methods was "clearly procedural," and "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached

to the crime." *Id.* at 293-94, 97 S. Ct. at 2298.

¶21 The Supreme Court also rejected an Ex Post Facto Clause challenge in *Collins v. Youngblood*, a non-death penalty case. The jury had imposed a prison sentence and a fine, the latter not authorized by law. 497 U.S. at 39, 110 S. Ct. at 2717. The Texas Court of Criminal Appeals reformed the sentence under a statute enacted after the defendant's criminal act took place. *Id.* at 40, 110 S. Ct. at 2718. The Supreme Court held that applying the sentence reform statute in the defendant's case did not violate the Ex Post Facto Clause because although the Sixth Amendment right to a jury trial is substantial, "it is not a right that has anything to do with the definition of crimes, defenses, or punishments." *Id.* at 51-52, 110 S. Ct. at 2724 (overruling *Thompson v. Utah*, 170 U.S. 343, 18 S. Ct. 620 (1898)).

¶22 In *State v. Correll*, in contrast, we found a violation of the Ex Post Facto Clause. 148 Ariz. 468, 482, 715 P.2d 721, 735 (1986), *rev'd in part on other grounds by Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998). A jury convicted the defendant of three counts of first degree murder. After the murders, but before sentencing, the legislature amended A.R.S. section 13-703.F to add multiple homicide convictions as an aggravating circumstance. We held that retroactively applying the new aggravating circumstance constituted a substantive change to capital murder and disadvantaged the defendant. *Id.* This change affected the substantive nature of the crime and sentencing by adding a new element that, if present, permitted the defendant to receive a more severe punishment than that available at the time of the crime.[5]

¶23 These cases clearly indicate not only that ex post facto principles generally do not bar applying procedural changes to criminal proceedings, but also that the general framework of a state's statutory capital sentencing scheme is procedural in nature. As *Collins* established, rights secured by the Sixth Amendment jury trial right, the

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[5] The Supreme Court's holding that aggravating factors serve as the functional equivalent of elements of the first degree murder offense makes this conclusion even more evident. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443.

right at issue here, are inherently procedural. 497 U.S. at 51, 110 S. Ct. at 2724. Under the holding of *Dobbert*, Arizona's change in the statutory method for imposing capital punishment is clearly procedural: The new sentencing statutes alter the method used to determine whether the death penalty will be imposed but make no change to the punishment attached to first degree murder. The new sentencing statutes added no new element, or functional equivalent of an element, to first degree murder.[6] *Correll*, 148 Ariz. at 481-82, 715 P.2d at 734-35. Hence, the changes to the state's capital sentencing procedures do not resemble the type of after-the-fact legislative evil contemplated by contemporary understandings of the ex post facto doctrine.

¶24 Even a procedural change amounts to an ex post facto violation, however, when it affects "matters of substance, by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime, or arbitrarily infringing upon substantial personal rights." *Collins*, 497 U.S. at 45, 110 S. Ct. at 2720 (quoting *Beazell*, 269 U.S. at 171, 46 S. Ct. at 69; *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 508 (1915); and *Duncan v. Missouri*, 152 U.S. 377, 382-83, 14 S. Ct. 570, 572 (1894)) (internal quotation marks omitted). The change involved here does not affect the substantive matters of the defendants' prosecutions. *See id.* Under the new sentencing statutes, to obtain a death sentence, the state must prove the same aggravating circumstances required by the former statute and must prove them beyond a reasonable doubt. The only difference is that a jury, rather than a judge, decides whether the state has proved its case. The new sentencing statutes do not place the defendants in jeopardy of any greater punishment than that already imposed under the superseded statutes. Accordingly, applying the new sentencing statutes does not violate the federal or state Ex Post Facto Clause.

IV.

Does the Double Jeopardy Clause Prohibit Resentencing Under

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[6] S.B. 1001 made only technical and conforming changes to the aggravating circumstance list. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

¶25 The defendants argue that the double jeopardy provisions of the United States and Arizona Constitutions[7] preclude resentencing under the new sentencing statutes. We hold that they do not.

¶26 Double jeopardy prevents the government from prosecuting an individual more than once for the same offense. *Green v. United States*, 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957). According to the Supreme Court:

> The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88, 78 S. Ct. at 223; *see also Sattazahn v. Pennsylvania*, ___ U.S. ___, ___; 123 S. Ct. 732, 745-46 (2003) (reaffirming principle that the underlying purpose of the Double Jeopardy Clause is to prohibit repeated attempts by the state to convict, thereby exposing a defendant to embarrassment, expense, and the ordeal of another proceeding).

¶27 Double jeopardy principles generally do not apply to sentencing proceedings. *United States v. DiFrancesco*, 449 U.S. 117, 132, 101 S. Ct. 426, 435 (1980). Capital sentencing proceedings, however, provide an exception to the general rule. The penalty phase of a capital trial resembles an ordinary trial proceeding in which the sentencing authority chooses "between two alternatives together with standards to guide [its] decision, [and] the prosecution undert[akes] the burden of

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[7] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

"No person shall . . . be twice put in jeopardy for the same offense." Ariz. Const. art. II, § 10.

establishing facts beyond a reasonable doubt." *Monge v. California*, 524 U.S. 721, 730, 118 S. Ct. 2246, 2251 (1998) (discussing *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852 (1981)); *see Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 2310 (1984) (holding double jeopardy applies to the penalty phase of capital trial because the penalty phase "proceeding is like a trial"). Therefore, we must determine whether resentencing the defendants under Arizona's new sentencing statutes violates the prohibition against double jeopardy.

A.

Resentencing Does Not Increase Sentences.

¶28 The defendants argue that because Arizona's former law prescribing judge sentencing was unconstitutional, the most severe penalty they could have received for first degree murder at the original sentencing was life or natural life in prison. They assert that, under superseded section 13-703, a convicted murderer could not receive the death penalty because that punishment conceptually did not exist. Therefore, they argue, a resentencing proceeding under the new sentencing statutes would expose them to a more severe penalty than was originally available and thus constitutes double jeopardy. The defendants rely upon decisions from two state intermediate appellate courts, *California v. Harvey*, 142 Cal. Rptr. 887 (App. 1978), and *State v. Choate*, 151 Ariz. 57, 725 P.2d 764 (App. 1986).

¶29 In *Harvey*, a jury convicted Harvey of several counts, including first degree murder of a police officer. 142 Cal. Rptr. at 888. After Harvey's sentencing, the California Supreme Court declared the state's capital sentencing statute unconstitutional because it failed to bring mitigating evidence into the sentencing calculus. *Id.* at 890-91; *see Rockwell v. Superior Court*, 556 P.2d 1101, 1116 (Cal. 1976). While Harvey's appeal was pending, the California Legislature amended the state's capital sentencing scheme. *Harvey*, 142 Cal. Rptr. at 890-91. The state argued that Harvey should be resentenced under the new statute. *Id.* The appellate court disagreed, holding that resentencing would violate double jeopardy because, when the state supreme court

held the former capital sentencing scheme unconstitutional, "that declaration automatically reduced appellant's sentence to life imprisonment." *Id.* at 891.

¶30 Similarly, in *Choate*, the Arizona Court of Appeals held that double jeopardy prevented resentencing of a defendant on a dangerous-nature sentencing issue. 151 Ariz. at 58, 725 P.2d at 765. A jury convicted Choate of second degree murder and aggravated assault. *Id.* at 57, 725 P.2d at 764. The court of appeals vacated the dangerous-nature sentence for the second degree murder conviction because that issue was not determined by a jury. *Id.* On remand, the trial judge ordered a new jury to convene to determine whether Choate should receive the dangerous-nature sentence. *Id.* Choate appealed that order. The court of appeals concluded that, because the trial judge mistakenly dismissed the jury without submitting the dangerous nature charge in the first case, permitting a new jury to consider the enhancement allegation would constitute double jeopardy. *Id.* at 58, 725 P.2d at 765.

¶31 The Supreme Court addressed this very issue in *Dobbert*, however, and reached a different conclusion. Dobbert made the same argument that the defendants make here. The Florida Supreme Court declared the death penalty statute in effect at the time of his murders unconstitutional. Therefore, Dobbert argued, he could not receive a death sentence because "at the time he murdered his children there was no death penalty 'in effect' in Florida." 432 U.S. at 297, 97 S. Ct. at 2300. The Supreme Court rejected this argument, holding that double jeopardy did not attach because a statute, albeit unconstitutional, permitting capital punishment for first degree murder existed at the time of the crimes. *Id.* at 298, 97 S. Ct. at 2300. That statute placed the defendant on notice that he faced capital punishment if he were convicted. *Id.*

¶32 The *Harvey* court distinguished *Dobbert* by noting that Dobbert was ultimately sentenced under a constitutional statute, whereas Harvey was not. 142 Cal. Rptr. at 890. We do not find the distinction persuasive, however, because it does not affect the Supreme Court's *Dobbert* analysis. There the Court discounted the defendant's "sophistic

argument" because the more important consideration was that the state's first degree murder sentencing policy provided a death sentence even though the *procedures* for imposing that sentence later were found unconstitutional. *Dobbert*, 432 U.S. at 297-98, 97 S. Ct. at 2300 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 318 (1940)); *see also Knapp v. Cardwell*, 667 F.2d 1253, 1264 & n.9 (9th Cir. 1982) (rejecting argument that death sentence is automatically reduced "to life imprisonment immediately upon invalidation of the state's death penalty law"). In short, the Court rejected the defendants' argument in *Dobbert*.

¶33 The basic issue we must resolve is not whether a death sentence metaphysically existed when the defendants were sentenced, but rather whether any defendant was "acquitted" at his original trial of whatever findings were necessary to impose a death sentence. While a defendant can be resentenced following an appellate reversal of his or her original sentence, the Double Jeopardy Clause prohibits imposing any sentence of which the defendant was either actually or impliedly "acquitted" in the first instance. *Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310; *Bullington*, 451 U.S. at 437, 445, 101 S. Ct. at 1857, 1861; *Peak v. Acuna*, 203 Ariz. 83, ___ ¶ 8, 50 P.3d 833, 835 (2002) (stating implied acquittal exists where appellate court reverses conviction for insufficiency of evidence and double jeopardy precludes retrial). Thus, a defendant cannot be sentenced to death at a subsequent sentencing proceeding if "the sentencer or reviewing court has decided that the prosecution has not proved its case *that the death penalty is appropriate*." *Poland v. Arizona*, 476 U.S. 147, 155, 106 S. Ct. 1749, 1755 (1986) (internal quotation marks omitted).

¶34 The Supreme Court has thoroughly treated and established the legal principle that applies here. In *State v. Rumsey*, a jury convicted the defendant of first degree murder. 130 Ariz. 427, 636 P.2d 1209 (1981). During the sentencing phase of the trial, the judge, misinterpreting the pecuniary gain aggravating circumstance as applying only to a murder for hire, found no aggravating circumstances and sentenced the defendant to life in prison. *Id.* at 431-32, 636 P.2d at 1213-14. On appeal, we held that the pecuniary gain aggravating circumstance

included any murder committed for financial gain and remanded the matter for resentencing. *Id.* at 431, 636 P.2d at 1213. On remand, the judge determined that the pecuniary gain circumstance existed and sentenced the defendant to death. *State v. Rumsey*, 136 Ariz. 166, 168, 665 P.2d 48, 50 (1983). We reviewed the case on direct appeal and held that Rumsey's death sentence violated the Double Jeopardy Clause because the life sentence imposed at his first trial implicitly acquitted him of the death sentence, and that Rumsey was "entitled to finality" on that issue. *Id.* at 175, 665 P.2d at 57.

¶35 The Supreme Court granted *certiorari* and affirmed. It held that a capital defendant cannot receive the death penalty on resentencing if he originally had been sentenced to life in prison. *Rumsey*, 467 U.S. at 212, 104 S. Ct. at 2310. The Court explained that "an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge." *Id.* at 211, 104 S. Ct. at 2310. Thus, the Supreme Court's *Rumsey* decision speaks to situations in which the defendant originally received a sentence *other than* death.

¶36 In a similar case in which the defendant originally received a capital sentence, however, the Supreme Court ruled differently. In *Poland v. Arizona*, the Court held that capital defendants sentenced to death at their original sentencing proceeding and whose sentences were vacated on appeal can be resentenced to death on remand. 476 U.S. at 151, 106 S. Ct. at 1753. Both of the Poland brothers received death sentences following their first degree murder convictions. *State v. Poland*, 132 Ariz. 269, 273, 645 P.2d 784, 788 (1982). During the sentencing phase, the judge failed to find the pecuniary gain aggravating circumstance because, like the trial judge in *Rumsey*, he misunderstood that circumstance as applying only to a murder for hire. *Id.* at 285-86, 645 P.2d at 800-01. The judge did, however, find the "especially heinous, cruel or depraved" statutory aggravating factor and sentenced the defendants to death. *Id.* at 285, 645 P.2d at 800. On appeal, this court held that the evidence adduced during the sentencing proceeding did not support a finding of a heinous, cruel or depraved murder. *Id.* at 285, 645 P.2d at 800. We also restated that a killing need not be a murder for hire to qualify for the pecuniary gain aggravator. *Id.*

at 286, 645 P.2d at 801. On remand, the judge again sentenced both Polands to death. *State v. Poland (Patrick)*, 144 Ariz. 388, 392, 698 P.2d 183, 187 (1985); *State v. Poland (Michael)*, 144 Ariz. 412, 414, 698 P.2d 207, 209 (1985). We again reviewed and affirmed the Polands' sentences on direct appeal and held that the evidence, although insufficient to support a finding of cruelty, did support a finding of pecuniary gain motive. *Poland (Patrick)*, 144 Ariz. at 407, 698 P.2d at 202; *Poland (Michael)*, 144 Ariz. at 416, 698 P.2d at 211.

¶37 On *certiorari*, the Supreme Court distinguished the Polands' case from *Rumsey*, and that distinction was critical. In *Poland*, both defendants *originally received* capital sentences. Unlike the judge in Rumsey's trial, no fact-finder had "acquitted" the Polands of capital murder by imposing a prison sentence at the first sentencing proceeding. *Poland*, 476 U.S. at 156-57, 106 S. Ct. at 1756. On resentencing, then, the defendants did not face sentencing on a charge of which they had been previously "acquitted" for double jeopardy purposes. *Id.* at 157, 106 S. Ct. at 1756. Therefore, jeopardy did not attach and double jeopardy did not bar the subsequent death sentences. *Id.*

¶38 Like the defendants in *Poland*, the defendants on direct appeal all received death sentences at their original trials. The fact-finder made those findings necessary to impose a death sentence. In no sense has a fact-finder concluded that the state failed to prove aggravating circumstances beyond a reasonable doubt. On remand, no defendant can receive a sentence greater than that which already has been imposed. Accordingly, we hold that jeopardy has not attached.

B.

Resentencing Does Not Supplement the Original Jury Verdict.

¶39 The defendants also argue that resentencing violates double jeopardy because further jury proceedings supplement the original jury verdict, thereby violating each defendant's constitutional "right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S.

684, 689, 69 S. Ct. 834, 837 (1949). Although completing a defendant's trial with the same judge or jurors is ideal, a defendant holds no absolute right to such an arrangement. In fact, in *Wade v. Hunter*, the Supreme Court affirmed a military conviction in which the charges were dropped from one court-martial proceeding and re-instituted in another to accommodate witnesses. *Id.* at 687-88, 69 S. Ct. at 836. According to the Supreme Court:

> The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.

Id. at 688-89, 69 S. Ct. at 837.

¶40 The ability to resentence a capital defendant by a different set of jurors is implicit in double jeopardy cases decided by the Supreme Court in a death penalty context. *See Rumsey*, 467 U.S. at 211, 104 S. Ct. at 2310; *Wade*, 336 U.S. at 688-89, 69 S. Ct. at 837.[8] A capital defendant whose original sentence is vacated on appeal can be resentenced to death so long as the defendant has not been "acquitted" of the death sentence. *E.g.*, *Sattazahn*, ___ U.S. at ___, 123 S. Ct. at 738; *Poland*, 476 U.S. at 151, 106 S. Ct. at 1753.

C.

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[8] For the most part, recalling the defendant's original guilt phase jury also presents logistical problems and is wholly impractical.

The Arizona Constitution.

¶41 We reach the same result under Article II, Section 10 of the Arizona Constitution. In *Pool v. Superior Court*, we interpreted the state Double Jeopardy Clause more broadly than its federal counterpart when prosecutorial misconduct causes a mistrial. 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984); *accord State v. Minnitt*, 203 Ariz. 431, ___ ¶ 29, 55 P.3d 774, 781 (2002). While we recognized the importance of consistency between federal and state constitutional law, we found it necessary to diverge from the double jeopardy standards established by the United States Supreme Court under the federal constitution. Our decision turned on the principle that the purpose of the Arizona Double Jeopardy Clause includes protecting citizens from facing multiple trials for the same offense because of prosecutorial bad faith:

> In our view, therefore, the resolution of the question of when jeopardy attaches should turn upon the concept of enforcing the constitutional guarantee against double jeopardy when the right to be free from multiple trials, which that clause was meant to guarantee, would be impaired by the prosecutor's intentional, improper conduct. We do not agree that standards cannot be formulated to accomplish the objectives of the clause in situations such as this.

Pool, 139 Ariz. at 108, 677 P.2d at 271 (citation omitted).

¶42 The defendants do not face further jeopardy because of prosecutorial misconduct. Moreover, we find no reason to extend the state Double Jeopardy Clause beyond its federal counterpart under these facts. Therefore, we conclude that applying the new sentencing statutes does not constitute a double jeopardy violation under the Arizona Constitution.

V.

Should Defendants Convicted of Murders Committed Before the Natural Life Sentence Became Available Have Their Sentences Reduced to Life if the Court Reduces Their Sentences?

¶43 In 1993, the Arizona Legislature amended A.R.S. section 13-703 to add a "natural life" sentencing option for defendants convicted of first degree murder. 1993 Ariz. Sess. Laws ch. 153, § 1. The parties stipulate, and we agree, that the sentence of life without the possibility of parole for twenty-five years, rather than natural life, must apply to those defendants sentenced under the pre-1993 statute. *See, e.g., State v. Barreras*, 181 Ariz. 516, 523-24 n.7, 892 P.2d 852, 859- 60 n.7 (1995) ("The amended statute [permitting natural life sentence] is inapplicable here, however, because this case arose before its effective date."). If subsequent proceedings result in life sentences, these defendants cannot receive a natural life sentence; only a sentence of life without the possibility of parole for twenty-five years can apply.

VI.

Should the Court Review Sixth Amendment *Ring II* Error as Structural Error or for Harmless Error?

¶44 The Supreme Court struck down Arizona's former capital sentencing statutes because they permitted a judge, rather than a jury, to find aggravating factors. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. We conclude that Arizona's failure to submit this element of capital murder to the jury does not constitute structural error. Consequently, the Sixth Amendment does not require automatic reversal of a death sentence imposed under the former sentencing statutes. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833 (1999); *Arizona v. Fulminante*, 499 U.S. 279, 306-07, 111 S. Ct. 1246, 1263 (1991). Instead, we will review the defendants' capital sentences for harmless error.

¶45 Most errors that we consider on appeal, even those involving constitutional error, constitute trial errors, "which occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Fulminante*, 499 U.S. at 307-08, 111 S. Ct. at 1264. In cases involving trial error, we consider whether the error, so assessed, was harmless

beyond a reasonable doubt. If so, we uphold the verdict entered. In a limited number of cases, however, structural error occurs. In such instances, we automatically reverse the guilty verdict entered. Unlike trial errors, structural errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 3106 (1986)).

¶46 The Supreme Court has defined relatively few instances in which we should regard error as structural. Those instances involve errors such as a biased trial judge,[9] complete denial of criminal defense counsel,[10] denial of access to criminal defense counsel during an overnight trial recess,[11] denial of selfrepresentation in criminal cases,[12] defective reasonable doubt jury instructions,[13] exclusion of jurors of the defendant's race from grand jury selection,[14] excusing a juror because of his views on capital punishment,[15] and denial of a public criminal trial.[16] In all those instances, the error infected "the entire trial process" from beginning to end. *Neder,* 527 U.S. at 8, 119 S. Ct. at 1833 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 1717 (1993)).

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[9] *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

[10] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963).

[11] *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330 (1976).

[12] *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944(1984).

[13] *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078 (1993).

[14] *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617 (1986).

[15] *Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045 (1987).

[16] *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984).

¶47 The Court's *Ring II* decision turned upon the fact that aggravating circumstances serve as the functional equivalent of an element of the greater capital murder offense, rather than as a sentencing factor. *Ring II*, 536 U.S. at ___, 122 S. Ct. at 2443. "Because Arizona's enumerated aggravating factors operate as the *functional equivalent of an element of a greater offense*," the Supreme Court held, "the Sixth Amendment requires that they be found by a jury." *Id.* (emphasis added) (citation and internal quotations omitted). The essential question, therefore, is whether we should characterize Arizona's failure to submit this element of the capital murder offense to the jury as structural or trial error.[17]

¶48 In a decision foreshadowing *Apprendi* and *Ring II*, the Supreme Court declined to find structural error when the trial judge failed to submit an element of the offense to the jury. In *Neder v. United States*, the Court held that the trial court's failure to instruct the jury on the materiality element of federal tax fraud should be reviewed as trial error. 527 U.S. at 19-20, 119 S. Ct. at 1839. The Court distinguished an error omitting an element of the offense in a jury instruction from structural error: "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9, 119 S. Ct. at 1833. Thus, the Court concluded, omitting an element of the offense from the jury instruction is not the sort of error that taints the trial process itself.

> Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; a fairly selected, impartial jury was instructed

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[17] At various times, the Court's opinion suggests that *Ring II* error should be considered under a harmless error analysis. First, the Court declined to review the case for harmless error, stating instead that state courts should be the first to do so. *Ring II*, 536 U.S. at ___ n.7, 122 S. Ct. at 2443 n.7. Second, when commenting upon the fate of death row inmates after the *Ring II* decision, Justice O'Connor stated that "prisoners will be unable to satisfy the standards of harmless error or plain error review." *Id.* at ___, 122 S. Ct. at 2449 (O'Connor, J., dissenting). Because the Court did not consider the issue of the appropriate standard of review, we do not regard these statements as conclusive.

> to consider all of the evidence and argument in respect to Neder's defense against the tax charges. Of course, the court erroneously failed to charge the jury on the element of materiality, but that error did not render Neder's trial "fundamentally unfair," as that term is used in our cases.

Id. at 9, 119 S. Ct. at 1834.[18]

¶49 In a similar decision that followed *Apprendi* and *Ring II,* the Court again applied the plain error test to a judge's consideration of a factor properly left to the jury. *United States v. Cotton*, 535 U.S. 625, ___, 122 S. Ct. 1781, 1785 (2002). Federal law makes available enhanced penalties for drug offenses if the government proves a statutory threshold drug quantity. *Id.* at ___, 122 S. Ct. at 1783. In *Cotton*, the government failed to allege in its superseding indictment the quantity of drugs involved in the offense, as required by the enhanced penalty. *Id.* Based on trial testimony, the district court found the petitioner "responsible for at least 500 grams of cocaine base," ten times the amount set by statute for an enhanced penalty, and imposed the enhanced sentence. *Id.* at ___, 122 S. Ct. at 1784. The Supreme Court concluded that the district court improperly usurped the quantity finding from the grand jury, but reviewed for plain error. *Id.* at ___, 122 S. Ct. at 1785-86. The Court held that the trial evidence was so "overwhelming" and "essentially uncontroverted" that "the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at ___, 122 S. Ct. at 1786.

¶50 Although *Neder* and *Cotton* did not involve a capital sentence, their holdings that a failure to submit one element of an offense to a jury does not infect the trial process from beginning to end apply equally here. Under both Arizona's superseded and current capital sentencing schemes, a defendant's trial consists of two phases: a guilt phase and a penalty phase. In the guilt phase, the jury decides whether

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[18] *See also California v. Roy*, 519 U.S. 2, 5-6, 117 S. Ct. 337, 339 (1996) (holding trial judge's failure to instruct jury on an element of accomplice liability first degree murder was a trial error to which the harmless error test applied).

the defendant committed first degree or felony murder as defined by A.R.S. section 13-1105. If the jury finds the defendant guilty beyond a reasonable doubt, the trial continues to the penalty phase. Under the former system, the judge found, beyond a reasonable doubt, the ultimate element required to complete a capital murder offense: at least one aggravating circumstance not outweighed by one or more mitigating factors. A.R.S. § 13- 703.E. Defendants' trials thus took place before an impartial judge and jury, who used the correct standard of proof. Defendants received the assistance of counsel, who were available during all phases of their prosecution. Any error, then, affected the submission of one element rather than the entire trial and did not render the entire trial fundamentally unfair.[19] *See Neder*, 527

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[19] The dissent disagrees with this conclusion, arguing that the defendants experienced a "[c]omplete denial of [the right to] trial by jury at the sentencing phase . . . ." Dissent, ¶ 109. Notably, the dissent does not suggest that the defendants were denied a trial by jury, and it could not, for the error here resulted not from denying defendants a jury trial but from the failure to submit one element of the capital offense to the jury for decision. A capital trial comprises just one trial, divided into guilt and sentencing phases, and has always been understood as such, both by this court and by the U.S. Supreme Court. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 2634 (1994) (holding trier of fact must find one aggravating circumstance at either the guilt or penalty phase); *Payne v. Tennessee*, 501 U.S. 808, 817, 823, 825-26, 111 S. Ct. 2597, 2604, 2607-08 (1991) (repeated references to "guilt phase" and "penalty phase" of capital trial); *State v. Smith*, 203 Ariz. 75, *passim*, 50 P.3d 825, *passim* (2002) (referring to "sentencing phase" and "sentencing hearing"); *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151 (referring to a "separate evidentiary hearing"). The only courts of which we are aware that have considered the argument that a capital trial consists of two "trials" rather than two phases of one trial have rejected the dissent's approach. *Flamer v. Delaware*, 68 F.3d 736, 758-59 (3rd Cir. 1995) ("The guilt and penalty phases of a capital trial are parts of a single proceeding, and there is no constitutional requirement that they be treated as if they were two entirely separate trials."); *Holland v. Mississippi*, 705 So. 2d 307, 330 ¶ 61 (Miss. 1997) (sentencing phase of a capital trial not a separate trial, but that phase of the case that concerns sentencing).

Arizona statutes reflect the single capital trial approach accepted by our court and the Supreme Court. Arizona law refers to the sentencing proceeding as the capital trial's "penalty phase." *E.g.*, A.R.S. § 13-703.C. In addition, former and current capital sentencing statutes permit use at the sentencing phase of evidence adduced during the guilt phase of the trial. *Id.* §§ 13-703.C (2001), 13-703.D (Supp.

(continued...)

U.S. at 9, 119 S. Ct. at 1833.

¶51 We are not the first court to reach this conclusion. Courts implementing *Apprendi* and *Ring* have reached a consensus that structural error does not occur when a judge fails to submit to the jury an element of a crime, otherwise required to be found by a jury under the Sixth Amendment.[20] In *United States v. Matthews*, the court held "*Apprendi* error is susceptible to harmless error analysis." 312 F.3d 652, 665 (5th Cir. 2002). The Seventh Circuit Court of Appeals also found "that errors in both the indictment and the charge to the jury are subject to harmless-error analysis." *United States v. Dumes*, 313 F.3d 372, 385 (7th Cir. 2002); *accord United States v. Sanders*, 247 F.3d 139, 150 (4th Cir. 2001) (citing cases from the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits holding that harmless error applies in *Apprendi* cases); *Johnson v. Nevada*, P.3d 450, 459-60 (Nev. 2002).[21]

(...continued)
2002).

[20] The one case finding structural error is *Esparza v. Mitchell*, a case involving a challenge under the Eighth Amendment rather than the Sixth. In that case, two members of the panel held the harmless error test inapplicable in a capital case where, under Ohio law, aggravating factors were required to be charged in the indictment but were not. 310 F.3d 414, 421 (6th Cir. 2002). The dissenting judge, concluding that harmless error applied, outlined the seminal Supreme Court cases defining the harmless error doctrine and concluded that the error involved did not amount to deprivation of "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id.* at 428 (Suhrheinrich, J., dissenting) (quoting *Neder*, 527 U.S. at 8-9, 119 S. Ct. at 1833 (internal quotation marks omitted)).

[21] In addition to these decisions involving the Sixth Amendment, federal courts have held that Eighth Amendment violations occurring at the trial court level are subject to harmless error analysis. *See, e.g., Jones (Lewis) v. United States*, 527 U.S. 373, 402-05, 119 S. Ct. 2090, 2108-10 (1999); *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441 (1990). Most recently, the Ninth Circuit Court of Appeals held that a death sentence imposed when an unconstitutionally vague jury instruction was given could be reviewed for harmless error. *Valerio v. Crawford*, 306 F.3d 742, 756

(continued...)

¶52 Those holdings comport with prior Arizona law. In *State v. Styers*, we applied the fundamental error test to the trial judge's failure to define the "without legal authority" element of the kidnapping offense in instructions to the jury. 177 Ariz. 104, 111-12, 865 P.2d 765, 772-73 (1993).

¶53 Accordingly, we hold that Arizona's failure to require a trial judge to submit the aggravating circumstance element of capital murder to a jury does not constitute structural error. We will review the sentences of these defendants for harmless error.

VII.

A.

Does *Ring II* Apply to Aggravating Circumstances Involving Prior Convictions?

¶54 Arizona law establishes two aggravating circumstances for prior criminal convictions.[22] A.R.S. § 13-703.F.1-.2. The first of Arizona's prior conviction factors, A.R.S. section 13- 703.F.1, applies when "[t]he defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." The second, A.R.S. section 13-703.F.2, is implicated when "[t]he defendant was previously convicted of a serious

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(...continued)
(9th Cir. 2002) ("When a state trial court sentences a defendant to death based in part on an unconstitutionally vague aggravating circumstance, the state appellate court . . . can find the error harmless under *Chapman v. California*." (Citation omitted.)).

[22] The 2002 amendment did not change the F.1 and F.2 aggravating factors. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

offense, whether preparatory or completed."[23] In *Almendarez-Torres v. United States*, the Supreme Court held that a judge could consider prior convictions to enhance a penalty beyond that authorized by the facts established by the jury's verdict. 523 U.S. 224, 226-27, 118 S. Ct. 1219, 1222 (1998).

¶55 The State argues that *Almendarez-Torres* establishes an exception to *Apprendi/Ring* for the two prior conviction aggravating circumstances. According to the State, a judge may constitutionally determine the existence of any prior conviction. The defendants argue

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[23] Section 13-703 H defines "serious offense" as:

1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

A.R.S. § 13-703.H (Supp. 2002).

Before 1993, this aggravating circumstance occurred if "[t]he defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." A.R.S. § 13-703.F.2 (1989), *amended by* 1993 Ariz. Sess. Laws ch. 153, § 1.

that *Almendarez-Torres* is no longer good law.[24] They also argue that the F.1 and F.2 aggravating circumstances do not fit within the prior conviction exception. Alternatively, they argue that the Arizona Constitution's jury trial guarantee should supplant *Almendarez- Torres* and require a jury determination of prior convictions. For the following reasons, we hold that *Almendarez-Torres* remains effective and that the Sixth Amendment does not require a jury to determine prior convictions under sections 13-703.F.1 and F.2.

1. Prior Conviction Aggravating Circumstance.

¶56 First we consider whether Arizona's statutory aggravating circumstance for prior convictions falls within the *Almendarez-Torres* exception. In cases handed down within the past five years, the Supreme Court consistently has stated that a statutory provision permitting increased penalties when a defendant has a prior conviction operates as a sentencing enhancement and not as an element of a criminal offense.[25]

¶57 In two Supreme Court cases, defendants challenged sentencing enhancements when the government failed to allege the factor

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[24] The defendants argue that we should ignore *Almendarez- Torres* because Justice Thomas allegedly has repudiated his position in that case, thereby "expressly" invalidating the decision. In *Apprendi v. New Jersey*, Justice Thomas did express regret for voting with the five member *Almendarez-Torres* majority. 530 U.S. 466, 518-21, 120 S. Ct. 2348, 2378-79 (2000).

The defendants' supposition as to Justice Thomas's view, however, does not comport with the Supreme Court's recent decision in *Sattazahn v. Pennsylvania*, U.S. ___, 123 S. Ct. 732 (2003). In that case, Justice Thomas joined Justice Scalia's separate opinion which stated, in *dicta*, that "the existence of any fact *(other than a prior conviction)* increas[ing] the maximum punishment that may be imposed . . . constitutes an element [of the offense]." *Id.* at ___, 123 S. Ct. at 739 (emphasis added). This language demonstrates the dangers of vote-counting before the Court announces its decision on a particular issue.

[25] The Court continuously refers to the prior conviction enhancement as an exception to *Apprendi*. *E.g.*, *Sattazahn*, ___U.S. at ___, 123 S. Ct. at 739; *United States v. Cotton*, 535 U.S. 625, ___, 122 S. Ct. 1781, 1783 (2002).

increasing their penalty in the indictment. In *Almendarez-Torres*, the Court held that a prior conviction need not be alleged in a criminal indictment. 523 U.S. at 226-27, 118 S. Ct. at 1222. The Court first concluded that Congress intended to use recidivism as a sentencing factor and not as a substantive element. *Id.* at 230-31, 118 S. Ct. at 1226. It then noted that recidivist provisions traditionally are used exclusively as sentencing factors, pointing out that no federal criminal statute contains recidivism as a statutory element. *Id.* at 244, 118 S. Ct. at 1231. Enhanced penalties for repeat offenders do "not relate to the commission of the offense, *but go[] to the punishment only*, and therefore . . . may be subsequently decided [by a judge]." *Id.* at 244, 118 S. Ct. at 1231 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629, 32 S. Ct. 583, 588 (1912)).

¶58 In its next term, the Court decided a similar case and reached a revised, but consistent, conclusion. In *Jones v. United States*, the Court held that federal prosecutors must allege in the indictment and prove, beyond a reasonable doubt, an element of the federal car jacking statute the lower courts previously had regarded as a sentencing factor. 526 U.S. 227, 229, 119 S. Ct. 1215, 1217 (1999). In Jones's case, serious bodily injury provided the additional element. *Id.* at 231, 119 S. Ct. at 1218. Notwithstanding its decision, the Court reaffirmed that "not every fact expanding a penalty range must be stated in a felony indictment" and expressly distinguished sentence enhancements for prior criminal convictions from other statutory elements because the law traditionally regards "recidivism as a sentencing factor, not as an element to be set out in the indictment." *Id.* at 248-49, 119 S. Ct. at 1226-27. The Court appeared less concerned with the fact that *Jones* involved a Sixth Amendment challenge, while *Almendarez-Torres* did not, than with the fact that sentencing enhancements for prior convictions serve a traditional penological purpose. *Id.*

¶59 The Court revisited the prior conviction sentence enhancement issue in *Apprendi*, decided one year after *Jones*. In *Apprendi*, the Court held that a statutory provision providing an increased penalty when a crime was motivated by "hate" involved not a sentencing enhancer, but an element of the offense. 530 U.S. at 491-92, 120 S. Ct. at 2363.

Consequently, the Sixth Amendment jury trial right required that the jury determine the element's existence before the enhanced penalty could be imposed. *Id.* at 490, 120 S. Ct. at 2362-63 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). The Court carefully distinguished its view that prior convictions are not elements of an offense and structured its holding to exclude prior convictions from its reach. *Id.* at 487-90, 120 S. Ct. at 2361-63.

¶60 The *Apprendi* Court found no need to submit the question of prior convictions to the jury because, unlike other factors, prior convictions already had been established through proceedings incorporating procedural safeguards:

> Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum statutory range.

530 U.S. at 488, 120 S. Ct. at 2362. Thus, permitting a judge to decide the "fact" of a prior conviction does not raise Sixth Amendment concerns; those convictions are themselves products of Sixth Amendment-compliant proceedings.

¶61 We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules or casts cognizable doubt on that decision. In *Agostini v. Felton*, the Court stated:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989)); *accord United States v. Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) ("If the views of the Supreme Court's individual justices and the composition of the Court remain the same, *Almendarez-Torres* may eventually be overruled.") (citing *Apprendi*, 120 S. Ct. at 2362 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.")); *State v. Harrod*, 200 Ariz. 309, 318 ¶ 44, 26 P.3d 492, 501 (2001) (rejecting defendant's argument that *Apprendi* implicitly overruled *Walton*), *vacated on other grounds by Harrod v. Arizona*, ___ U.S. ___, 122 S. Ct. 2653 (2002) (mem.). Our constitutional system requires adherence to the rule of law established in *Almendarez-Torres* unless and until the Court unequivocally disapproves its holding. *Ring I*, 200 Ariz. at 279-80 ¶ 44, 25 P.3d at 1151-52.

2. Lower Federal and State Appellate Courts.

¶62 Courts consistently have implemented both *Apprendi* and *Almendarez-Torres*. In cases decided after *Apprendi*, many defendants facing prior conviction sentence enhancements argued that *Apprendi* had either overruled or cast doubt upon *Almendarez-Torres*. Courts universally reject this argument and recognize that the two cases can be harmonized by construing *Almendarez-Torres* as the exception to *Apprendi*'s general rule. *E.g.*, *United States v. Martino*, 294 F.3d 346, 349 (2d Cir. 2002); *United States v. Stone*, 306 F.3d 241, 243 (5th Cir. 2002); *Cherry v. Araneta*, 203 Ariz. 532, ___ ¶ 5, 57 P.3d 391, 392-93 (App. 2002); *State v. Kendall*, 58 P.3d 660, 667-68 (Kan. 2002). In explaining its decision, the Ninth Circuit Court of Appeals stated:

> It is true that in *Apprendi*, the Court expressed reservations about *Almendarez-Torres*. However, the Court reasoned that any due process or Sixth Amendment concerns—arising out of the judicial determination of a "fact" that increased punishment beyond the statutory maximum—were mitigated in

> *Almendarez-Torres* by "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that [the defendant] did not challenge the accuracy of that 'fact' in his case." Thus, the Court in *Apprendi* chose not to overrule *Almendarez-Torres,* and unmistakably carved out an exception for "prior convictions" that specifically preserved the holding of *Almendarez-Torres.*

Pacheco-Zepeda, 234 F.3d at 414 (citations omitted).

¶63 The Supreme Court consistently has held that legislatures may permit a judge to impose an increased penalty based upon a defendant's recidivism. We therefore conclude that the Sixth Amendment does not require a jury to find prior convictions beyond a reasonable doubt.

3. F.1 and F.2 Prior Conviction Aggravating Factors.

¶64 Several defendants whose cases are consolidated in this appeal received death sentences based, at least in part, upon prior conviction findings made by a sentencing judge. Following the teachings of *Almendarez-Torres*, *Jones* and *Apprendi*, we hold that the Sixth Amendment does not require remanding these cases for resentencing on the F.1 and F.2 circumstances.

¶65 The characteristic of a prior conviction aggravating circumstance that sets it apart from other circumstances is that the original criminal proceeding, through either a guilty plea or a verdict of guilt, established the circumstance. No additional benefit derives from having a jury re-find an aggravating circumstance already established through a guilty plea or a jury verdict. At each proceeding giving rise to the prior criminal conviction, defendants either waived their right to a jury trial or received a jury determination of guilt, and procedural safeguards protected the defendant against constitutional violations. Moreover, each defendant had an opportunity to appeal his conviction.

¶66 The F.1 and F.2 aggravating circumstances contemplate a more severe punishment for persons who continue to commit crimes. Our

jurisprudence traditionally has viewed recidivism as a sentencing factor to be determined by a judge. *Almendarez-Torres*, 523 U.S. at 243, 118 S. Ct. at 1230. Moreover, under the pre-*Ring II* capital sentencing scheme, the legislature clearly intended prior convictions to be sentencing factors and not substantive elements of capital murder. *See, e.g.*, A.R.S. § 13-703.F–.G (Supp. 2001) (instructing the court to consider aggravating circumstances when deciding which sentence to impose).

¶67 We reach a different conclusion for those defendants for whom the trial judge found an F.2 aggravating circumstance prior to 1993. As to those defendants, determining the presence of the F.2 factor required additional fact finding; the judge needed to go beyond the mere fact that the prior conviction existed.

¶68 Arizona amended the requirements for finding an F.2 factor in 1993.[26] Prior to the 1993 amendment, section 13- 703.F.2 permitted finding this aggravating circumstance when "[t]he defendant was previously convicted of a felony in the United States *involving the use or threat of violence on another person.*" A.R.S. § 13-703.F.2 (1989) (emphasis added). State law did not define "violence" in this context. In *United States v. Breitweiser*, the court pointed out:

> If a recidivist statute permitted enhancement based on proof of underlying conduct, however, factual questions could arise as to exactly what conduct the defendant engaged in. Typically, such factual questions are within the province of a jury and this Court doubts that the Supreme Court would construe *Almendarez-Torres* as applying to such situations.

220 F. Supp. 2d 1374, 1379 (N.D. Ga. 2002). We agree that when an additional finding must be made beyond the bare fact that a prior conviction exists, the Sixth Amendment demands that a jury perform this task. That situation can arise for defendants whose F.2 factor depended upon a finding that a prior conviction reflected a crime

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[26] 1993 Ariz. Sess. Laws ch. 153, § 1.

involving the use or threat of violence. None of the consolidated defendants were sentenced under such a circumstance. Therefore, none of these cases involve a Sixth Amendment violation based on a judge's finding of one or more F.2 aggravating circumstances.

4. The Arizona Constitution.

¶69 This court has held that the Arizona Constitution's Sixth Amendment analog, Article II, Section 23,[27] provides substantially the same right to a jury trial as does the Sixth Amendment. *State v. Carlson*, 202 Ariz. 570, 577 ¶ 18, 48 P.3d 1180, 1187 (2002). Nevertheless, the defendants urge us to look to the Arizona Constitution to find a requirement that prior conviction aggravating circumstances must be found by a jury.

¶70 They point to two decisions. The first, *State v. Carlson*, rejected an argument that the Arizona constitutional right to an impartial jury provides greater protection than does the federal constitution against pretrial publicity affecting the jury pool. *Id.* at 576-77 ¶¶ 17-18, 48 P.3d at 1186-87. We stated that our constitution does not afford any greater protection to defendants against pretrial media coverage than does the federal constitution. *Id.* at 577 ¶ 18, 48 P.3d at 1187. The second case, *State ex rel. McDougall v. Strohson*, held that Arizona's Constitution traditionally provides greater access to jury trials than that required by the federal constitution. 190 Ariz. 120, 121-22, 945 P.2d 1251, 1252-53 (1997). Under the federal constitution, only crimes punishable by more than six months in jail must be tried by a jury. *Id.* at 122, 945 P.2d at

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[27] That provision states:

> The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Ariz. Const. art. II, § 23.

1253. In instances in which a defendant can be sentenced to less than six months in jail, in contrast, our constitution demands a jury trial if "the moral quality of the act charged, and its relationship to common law crimes" requires that a jury determine guilt.[28] *Id.*

¶71 In relying on these decisions, the defendants overlook the distinction between jury impartiality or jury access issues and the *Apprendi/Ring* issue. The *Carlson* case rejected an expansive interpretation of the Arizona Constitution because we were unwilling to move beyond federal precedent in this area. Our holding in *Strohson* means only that a defendant is entitled to a jury trial for certain minor crimes for which the federal constitution does not require a jury trial.

¶72 Under these facts, then, we hold that Article II, Section 23 provides substantially the same jury trial right as does the Sixth Amendment.

B.

Can the Finding of an Aggravating Circumstance Be Implicit in the Jury's Verdict of Conviction?

¶73 We asked the parties to discuss whether any aggravating circumstance could necessarily derive from a jury's verdict of conviction for first degree murder, either standing alone or when considered in conjunction with other contemporaneous convictions. The State argues that pecuniary gain, A.R.S. section 13-703.F.5, other homicides committed during the commission of the offense, A.R.S. section 13-703.F.8, and age of victim less than fifteen years or seventy years or older, A.R.S. section 13-703.F.9, can logically inhere in a verdict. The defendants argue that an aggravating circumstance can never be implicit.

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[28] For instance, we have held that the crimes of driving under the influence, *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966), and possession of marijuana, *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989), require a jury trial even though they are punishable by less than six months in jail.

¶74 We hold that the pecuniary gain and multiple homicide aggravators usually are not implicit in a jury's verdict. However, the age of the victim can be implicit in the verdict, if the jury simultaneously convicts the defendant of an offense that includes the age of the murdered victim as an element of the crime.[29]

1. Pecuniary Gain.

¶75 Under A.R.S. section 13-703.F.5, an aggravating circumstance exists when a murder is committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703.F.5. To establish the pecuniary gain aggravating circumstance, the state must prove that the murder would not have occurred but for the defendant's pecuniary motive. *State v. Harding*, 137 Ariz. 278, 296-97, 670 P.2d 283, 394-95 (1983).

¶76 Determining whether a defendant murdered his victim for pecuniary gain requires a highly fact-intensive inquiry. The state must establish the connection between the murder and motive through direct or strong circumstantial evidence. *State v. Cañez*, 202 Ariz. 133, 159 ¶ 94, 42 P.3d 564, 590 (2002) (holding murder of victim and only witness to robbery "is powerful circumstantial evidence of an intent to facilitate escape" and supports finding pecuniary motive); *State v. Gillies*, 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983) ("Without some tangible evidence, or strong circumstantial inference, it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain.").

¶77 Complex fact situations require careful attention and analysis before a fact-finder confidently can conclude that pecuniary ends motivated the killing. When the state concurrently prosecutes a capital defendant for first degree murder and, for instance, robbery, both crimes resulting from the same occurrence, the state does not establish

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[29] The 2002 amendment did not change the F.5 and F.8 aggravating circumstances. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1. It did, however, make a technical change to the F.9 factor. *Id.*

the pecuniary gain factor simply by showing that the robbery occurred. Rather, the state assumes the additional burden of showing that pecuniary gain was "a motive, cause, or impetus for the murder and not merely the result of the murder." *State v. Kayer*, 194 Ariz. 423, 433 ¶ 32, 984 P.2d 31, 41 (1999); *see, e.g., State v. Lee*, 185 Ariz. 549, 558, 917 P.2d 692, 701 (1996) (affirming pecuniary gain aggravating circumstance where defendant killed to facilitate escape after robbery).

¶78 The pecuniary gain factor thus requires more than the jury's conviction of a defendant for first degree murder and robbery or burglary. The fact-finder must draw the separate conclusion that the defendant killed, at least in part, for pecuniary motive. For that reason, we cannot conclude that a jury finding of pecuniary gain inheres in its robbery or burglary verdict.

¶79 Therefore, we will apply a harmless error analysis to the pecuniary gain factor. In those instances in which no reasonable jury could find that the state failed to prove a pecuniary gain motive beyond a reasonable doubt, we will find harmless error affecting that factor. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

2. Multiple Homicides.

¶80 A.R.S. section 13-703.F.8 permits a judge to find an aggravating circumstance if "[t]he defendant has been convicted of one or more other homicides, as defined in § 13-1101, that were committed during the commission of the offense." A.R.S. § 13-703.F.8. As with the pecuniary gain factor, this factor requires the state to establish more than that the jury convicted the defendant of first degree murder and one or more other homicides occurring around the same time. Instead, all homicides must take place during "one continuous course of criminal conduct." *State v. Rogovich*, 188 Ariz. 38, 45, 932 P.2d 794, 801 (1997) (quoting *State v. Ramirez*, 178 Ariz. 116, 130, 871 P.2d 237, 251 (1994)). This conclusion can be drawn only after the fact-finder analyzes "the temporal, spatial, and motivational relationships between the capital homicide and the collateral [homicide], as well as

. . . the nature of that [homicide] and the identity of its victim." *Id.* (quoting *State v. Lavers*, 168 Ariz. 376, 393, 814 P.2d 333, 350 (1991)).

¶81 A jury verdict convicting a defendant of two or more homicides does not in itself establish the multiple homicide aggravating circumstance. Without a finding that the murders are temporally, spatially and motivationally related, the bare jury verdict does not implicitly support the F.8 aggravator. *Id.*

¶82 e will find harmless error affecting this factor in hose cases in which no reasonable jury could find that the state failed to prove the F.8 factor beyond a reasonable doubt. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

3. Age of Victim.

¶83 Under A.R.S. section 13-703.F.9, an aggravating circumstance exists when, at the time the murder was committed, "[t]he defendant was an adult . . . or tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older." A.R.S. § 13-703.F.9. The statute is straightforward; the ages of the offender and victim invoke the aggravator. *Medina*, 193 Ariz. at 511 ¶ 23, 975 P.2d at 101 (holding this aggravating circumstance does not require further finding that the defendant was aware of the victim's age). The F.9 finding is implicit in the jury's verdict if the jury convicts the defendant of first degree murder and another crime committed against the murder victim in which the age of the victim constitutes a substantive element of the crime.

¶84 In some instances, Arizona's criminal code defines crimes based on the young age of the victim. For example, a person commits child molestation "by intentionally or knowingly engaging in or causing a person to engage in sexual contact, except sexual contact with the female breast, with a child under fifteen years of age." A.R.S. § 13-1410.A (2001).

¶85 Because the victim's age constitutes a substantive element of certain criminal offenses, a conviction necessarily reflects a jury determination that the victim was less than fifteen years old. The jury will have already found the necessary fact, age of the victim, through criminal proceedings compliant with Sixth Amendment safeguards. *Apprendi*, 530 U.S. at 488, 120 S. Ct. at 2362. Under these circumstances, the jury's implicit finding of the victim's age satisfies the F.9 aggravating circumstance.

¶86 If the trial judge found the F.9 factor and the jury also convicted the defendant of an age-dependent crime committed against the murder victim, we will find any *Ring II* error harmless. Other circumstances that may involve harmless error include, for example, those instances in which the defendant stipulated to the age of the victim or in which overwhelming evidence establishes the victim's age. In other instances, we will consider whether the *Ring II* error requires that we remand for resentencing.

C.
If One Aggravating Factor Was Not Subject to *Ring II*, Was Implicitly Found by the Jury or it Was Otherwise Obvious that One Aggravator Has Been Established Beyond a Reasonable Doubt,Is There Need for Resentencing?

¶87 The State asserts that if the jury implicitly found one aggravating factor or the trial judge found one factor not subject to the *Ring II* analysis, we can uphold the capital sentence imposed by the trial judge as harmless error. The argument relies upon the fact that Arizona's superseded sentencing scheme rendered a defendant "death eligible" if one aggravating factor existed. *Ring I*, 200 Ariz. at 279 ¶ 42, 25 P.3d at 1151. Nothing in *Ring II*, the State argues, prevents a trial judge from finding the second and succeeding aggravating factors, as well as finding mitigating factors and balancing them against the aggravator.

¶88 A narrow reading of *Ring II* may permit a judge to decide the existence of additional aggravating factors in the circumstances described by the State. As the State contends, once the government

establishes any aggravating factor, a defendant becomes "death eligible" in the strict sense, and establishing additional aggravating factors does not render a defendant "more" death eligible. In our view, however, *Ring II* should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, we conclude that *Ring II* requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring II*, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

¶89 Another factor leads us to conclude that we should not adopt the State's argument. As is evident, the procedures urged by the State do not reflect any sentencing procedure ever adopted by our legislature. In both the superseded and current capital sentencing schemes, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. §§ 13- 703.E (Supp. 2002) and 13-703.F (Supp. 2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. We will not speculate about how the State's proposal would impact this essential process. *Clemons v. Mississippi*, 494 U.S. 738, 754, 110 S. Ct. 1441, 1451 (1990) ("In some situations, a state appellate court may conclude that peculiarities in a case make appellate . . . harmless error analysis extremely speculative or impossible."); *see also Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002)(as applied to Nevada law, *Ring II* requires jury to weigh mitigating and aggravating factors under Nevada's statute requiring the fact-finder to further find whether mitigating circumstances are sufficient to outweigh the aggravating circumstances).

¶90 We therefore hold that the presence of one or more aggravating factors either exempt from *Ring II*, inherent in the jury's guilty verdict,

or otherwise established beyond a reasonable doubt does not, in itself, establish that a defendant's capital sentence resulted from harmless error.

D.

Does *Ring II* Require Resentencing if a Defendant Conceded or Did Not Challenge the Aggravating Factors Found by the Trial Court?

¶91 The State contends that if a defendant stipulates to facts sufficient to establish an aggravating factor or fails to challenge one or more aggravating circumstances, that factor stands. The failure renders error harmless and essentially establishes overwhelming, undisputed proof of that factor's existence. The defendants argue that neither concession nor failure to contest waives a defendant's right to a jury trial on aggravating factors. Substantial differences exist between a defendant's decision to concede an aggravating circumstance and a defendant's decision not to contest an aggravating circumstance, and we distinguish between those situations.

¶92 In *United States v. Cotton*, the Supreme Court reviewed a case in which the defendant did not contest an element responsible for his sentence enhancement. 535 U.S. 625, 122 S. Ct. 1781 (2002). The issue was whether *Apprendi* required vacating an enhanced sentence under a federal narcotics criminal statute when the government failed to include in the indictment the amount of cocaine, a fact essential to justifying the enhanced sentence. *Id.* at ___, ___ n.3, 122 S. Ct. at 1783, 1786 n.3. After examining for plain error, the Court found no reversible error under *Apprendi* because the government presented overwhelming and essentially uncontroverted evidence of the amount of cocaine base at trial. *Id.* at ___ & n.3, 122 S. Ct. at 1786 & n.3; *see also United States v. Smith*, 282 F.3d 758, 771-72 (9th Cir. 2002) (holding *Apprendi* error harmless where defendant failed to contradict evidence establishing drug quantity or object to jury instruction stating threshold drug quantity need not be found); *Robinson v. United States*, 129 F. Supp. 2d 627, 632 (S.D.N.Y. 2001) (holding failure to submit drug

quantity issue to jury did not prejudice defendant when he did not challenge the amount).

¶93 In cases in which a defendant stipulates, confesses or admits to facts sufficient to establish an aggravating circumstance, we will regard that factor as established. Our harmless error inquiry then focuses on whether no reasonable jury could find that the mitigation evidence adduced during the penalty phase is "sufficiently substantial to call for leniency." A.R.S. §13-703.E. Unless we conclude beyond a reasonable doubt that a jury would impose a death sentence, we must remand the case for resentencing. *See Id.* § 13-703.E; *Neder v. United States*, 527 U.S. 1, 19, 119 S. Ct. 1827, 1838 (1999); *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). See *infra*, Section VIII.

¶94 When a defendant simply fails to challenge an aggravating circumstance at the penalty phase, the state retains the burden of proving the aggravator's existence beyond a reasonable doubt. *See State v. Spreitz*, 190 Ariz. 129, 147, 945 P.2d 1260, 1278 (1997). Our inquiry then becomes whether the state has met its burden. If reasonable doubt exists as to this factor, then we must consider remanding for resentencing.

E.

Can the State Raise Harmless Error if It Did Not Make That Argument Below?

¶95 The defendants argue that the State waived its harmless error argument by failing to raise it prior to this stage of litigation. We disagree. Until the Supreme Court overruled *Walton v. Arizona*, the State had no reason to argue that failure to obtain jury findings as to aggravating factors constituted error at all. *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2, 113 S. Ct. 838, 842 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed."). Only after the Court defined constitutional error in Arizona's sentencing procedure did the question whether such error was harmless arise. We will not penalize the State for failing to

anticipate the Court's holding in *Ring II*.

¶96 Moreover, the Arizona Constitution imposes an independent obligation on the state judiciary not to reverse a case "for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done." Ariz. Const. art. VI, § 27 (2001); *accord* A.R.S. § 13-3987 (2001). If error is harmless, in these or other cases, substantial justice has been done.

F.

Does the Sixth Amendment Require the Jury to Make *Enmund-Tison* Findings in Capital Felony Murder Cases?

¶97 In cases of first degree felony murder convictions, an *Enmund-Tison* finding must be made to satisfy the Eighth Amendment's proportionality standard. *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368 (1982). In Arizona, the trial judge makes this finding. *See State v. Greenway*, 170 Ariz. 155, 171, 823 P.2d 22, 38 (1991). The defendants argue that *Ring II* requires that *Enmund-Tison* findings be made by a jury. We hold that the Sixth Amendment principles of *Apprendi/Ring* do not require a jury to make *Enmund-Tison* findings.

¶98 The Eighth Amendment's Cruel and Unusual Punishment Clause prohibits "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."[30] *Weems v. United States*, 217 U.S. 349, 371, 30 S. Ct. 544, 551 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40, 12 S. Ct. 693, 699-700 (1892) (Field, J., dissenting)). In capital punishment terms, the Eighth Amendment requires courts to consider carefully death sentences imposed on defendants convicted of felony murder. In *Enmund v. Florida* and *Tison*

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[30] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666, 82 S. Ct. 1417, 1420 (1962).

v. Arizona, the Supreme Court imposed Eighth Amendment cruel and unusual punishment restraints in capital felony murder cases. The Court held that Eighth Amendment principles forbid a state from sentencing to death a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Enmund*, 458 U.S. at 797, 102 S. Ct. at 3376. Five years later, in *Tison*, the Court refined its prior decision by holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158, 107 S. Ct. at 1688.

¶99 The Supreme Court already has addressed the question whether a jury must make *Enmund-Tison* findings. In *Cabana v. Bullock*, the Court held that the federal constitution does not require a jury to determine a defendant's level of culpability in capital felony murder cases. 474 U.S. 376, 385, 106 S. Ct. 689, 696 (1986). Foreshadowing its recent Sixth Amendment decisions, the Court distinguished *Enmund* from the statutorily defined elements of a substantive offense at issue in *Apprendi*:

> [O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant—it *establishes no new elements of the crime of murder that must be found by the jury.* Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." *Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.

Id. (citation and footnote omitted)(emphasis added).

¶100 We conclude that this distinction withstands *Apprendi* and *Ring II*. *Enmund-Tison* findings affect sentencing very differently than do

findings of aggravating circumstances. Even if a jury is satisfied that the state has established all statutory elements for capital felony murder, including aggravating circumstances, the judge must remove the defendant from the class of defendants otherwise death-eligible if she cannot make *Enmund-Tison* findings. The question is not whether the state has met its burden but whether, given a defendant's culpable mental state, the government can impose capital punishment consistent with the Eighth Amendment's proportionality threshold. That determination involves not a Sixth Amendment jury trial right but rather an Eighth Amendment proportionality analysis, traditionally the prerogative of the judge. As the *Cabana* Court stated:

> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.

Id. at 386, 106 S. Ct. at 697.

¶101 The difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury. *Id.* The Sixth Amendment assigns to the jury responsibility for determining whether all statutory criminal elements exist. Therefore, a defendant cannot receive a particular sentence unless a jury finds all the elements of the offense charged. *Id.* at 384, 106 S. Ct. at 696 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968)). The *Enmund-Tison* findings, on the other hand, operate as a judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed. These two rules of law are conceptually and constitutionally distinct. We hold that the Sixth Amendment does not require that a jury, rather than a judge, make *Enmund- Tison* findings.

VIII.

Conclusion.

¶102 Our review of aggravating circumstances will produce one of several results. In some of these consolidated cases, our review will not allow the conclusion, beyond a reasonable doubt, that the error did not contribute to or affect the capital sentence. In those cases, we must remand for resentencing.

¶103 Other cases will involve aggravators that we will regard as established. In some of those cases, the aggravating factors fall outside the *Ring II* analysis. Others will involve aggravating factors that inhere in the jury's verdict or to which a defendant stipulated. In yet other instances, the evidence presented at trial and the sentencing hearing may be sufficiently overwhelming that we will conclude no reasonable jury would have failed to find the factor established beyond a reasonable doubt. Even in these instances, however, one further determination can affect our harmless error analysis.

¶104 Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty:

> In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section *and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency*.

A.R.S. § 13-703.E (emphasis added);[31] *see also Id.* § 13-703.01.H. Because a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact

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[31] The legislature's post-*Ring II* amendments to section 13-703 replaced "court" with "trier of fact," referring to the jury or, in cases of a waiver of trial by jury, the court. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 1.

would determine that the mitigating circumstances were sufficiently substantial to call for leniency. If we cannot reach that conclusion, we must find reversible error and remand the case for resentencing. In separate opinions, we will consider individually the sentences of these defendants, applying the standards set forth in this opinion.

Ruth V. McGregor, Vice Chief Justice

CONCURRING:

Rebecca White Berch, Justice
Michael D. Ryan, Justice

F E L D M A N, Justice (Retired), concurring in part and dissenting in part:

¶105 I dissent from Part VI of the majority opinion because I cannot agree that the complete absence of the jury in the separate capital sentencing proceeding that determines a defendant's eligibility for the death penalty is reviewable for harmless error. In my view, the denial of a jury in the sentencing phase is a defect in the fundamental mechanism of the trial and is therefore structural error; thus the death sentence should be vacated. This is not only required by logic but is the teaching of a long line of our cases.

¶106 We have just recently held, for instance, that the erroneous exclusion for cause of prospective jurors was structural error that required reversal. *State v. Anderson*, 197 Ariz. 314, 324, ¶ 23, 4 P.3d 369, 379, ¶ 23 (2000). To hold otherwise and review for harmless error would lead us "down a slippery slope that could be used to justify overlooking every structural error [such as] denial of a jury trial or the right to counsel." *Id.* at 323, ¶¶ 21-22, 4 P.3d at 378, ¶¶ 21-22; *see also State v. Henley*, 141 Ariz. 465, 469, 687 P.2d 1220, 1224 (1984) (structural error to try defendant to eight-person jury when constitution guaranteed twelve-person jury for crime charged); *State v. Luque*, 171 Ariz. 198, 200, 829 P.2d 1244, 1246 (App. 1992) (trial to wrong number of jurors is fundamental, structural error).

¶107 If, as we have held, it is fundamental and structural error erroneously to exclude potential jurors or try a defendant to an insufficient number of jurors, it is difficult to see how deprivation of trial by jury at the capital sentencing phase can be less erroneous. The reason is plain: it is simply impossible to predict what a jury would have done if one had been impaneled. *State v. Smith*, 197 Ariz. 333, 339-40, 4 P.3d 388, 394-95 (App. 1999). Appellate review of such error is not "like measuring the effect of erroneous evidentiary rulings against the overall weight of properly admitted evidence. Errors involving the composition of the court or jury affect the legitimacy of the entire proceeding, leaving nothing to measure or weigh and requiring reversal." *Anderson,* 197 Ariz. at 323, ¶ 22, 4 P.3d 378, ¶ 22. The error in these cases is unlike trial errors, which can be "quantitatively assessed in the context" of all the evidence. *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S. Ct. 1246, 1264 (1991).

¶108 The majority concludes, however, that the failure to submit any part of the determination of aggravating circumstances to a jury was not structural error. Op. at ¶ 44. I cannot agree. As the majority explains, in capital sentencing prior to *Ring II*, the trial proceeded in two phases, a guilt phase and a sentencing phase. Op. at ¶¶ 7-13. The first, before a jury, was concerned only with the question of conviction or acquittal of the crime of first degree murder. The second, tried to the court under Arizona's prior sentencing statute, was concerned only with the issue of aggravating factors and mitigating circumstances. Each phase was tried to different factfinders on different issues. The Supreme Court, in these circumstances, has held that the sentencing phase resembles a separate trial, so much so that the double jeopardy clause applies both to the guilt phase and the sentencing phase. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686-87, 104 S. Ct. 2052, 2064 (1984); *Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852, 1862 (1981) (double jeopardy protection attaches to capital sentencing proceeding); *Arizona v. Rumsey*, 467 U.S. 203, 209, 104 S. Ct. 2305, 2309 (1984) (Arizona capital sentencing proceedings resemble a trial for purposes of the double jeopardy clause). This was our view also. *See State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983).

¶**109** Complete denial of trial by jury at the sentencing phase, therefore, would seem to preclude harmless error analysis. The right to trial by jury is "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447 (1968). The Supreme Court has now held defendants were entitled to a jury at the sentencing phase to determine the existence of the alleged aggravating factors but were denied that constitutional right. *Ring v. Arizona* 536 U.S., ___, ___, 122 S. Ct. 2428, 2443 (2002) *(Ring II)*. As noted, in Arizona denial of a jury trial is structural error. The same rule obtains in the federal system. *Sullivan v. Louisiana*, 508 U.S. 275, 281-282, 113 S. Ct. 2078, 2083 (1993) (the deprivation of the right to a jury trial unquestionably qualifies as structural error).

¶**110** The majority rejects this conclusion and supports its decision on the basis of *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1927 (1999). Op. at ¶ 44. But *Neder* and the cases that rely on it are cases of trial error, not error in the structure or mechanism of the trial. Neder was tried to a jury which was present during the entire trial. The error consisted of the trial judge failing to instruct the jury on materiality, one of the elements of the crime of tax fraud. The difference is that in *Neder*, the jury was presented with all of the evidence, and the issue of materiality was uncontested. *Neder*, 527 U.S. at 15, 119 S. Ct. at 1836. The Supreme Court held this was trial error, reviewable under a harmless error analysis. *Id.*

¶**111** The present cases are different. Unlike *Neder*, the error in these cases did not occur during the presentation of the case to the jury. Instead, the error was the complete absence of the jury during the penalty phase of the trial. The jury in Ring's trial heard no evidence, nor was it asked to make findings of any kind on the aggravating circumstances of the crime. And, even if such evidence may have been introduced at the guilt phase, it was not considered by a jury in the context of the death penalty. As a consequence, a jury verdict was never returned in these cases on the greater offense of capital murder. Thus, there is simply "no object, so to speak, upon which harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280, 113 S. Ct. at 2082.

¶112 To apply harmless error review in these consolidated cases would encourage the court to speculate that reversal is not necessary because the non-existent jury would have convicted the defendant in any event. The court, in other words, would transform itself into a phantom jury. The argument is not supportable.

¶113 In these consolidated cases, the majority must concede that the jury was erroneously discharged before the trial was completed. If this permits harmless error review, then, one must suppose, we would also review for harmless error if the trial judge directed a verdict for the state on one or more elements of the charge, granted summary judgment on an element, or discharged the jury after it had determined some but not all of the charges. Such results are also unsupportable, in my view. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Id.*

¶114 Today's opinion puts the majority in the position of speculating about one of the great unknowables — what a nonexistent jury would have done. We might argue about whether some or any degree of accuracy can be obtained by such speculation, but the argument is irrelevant. Both the state and federal constitutions guarantee defendants the right to trial by jury — not for one-half of the trial, not for two-thirds, fourfifths, or nine-tenths of the trial but for the whole trial. When the jury trial guarantee is violated, I believe structural error has occurred. The Constitution does not then permit judges to conclude the error was harmless; it requires the court to conclude that the trial mechanism violated the Constitution and the result should not be affirmed.

Stanley G. Feldman, Justice (Retired)

¶115 I concur in all but Part VI of the majority opinion and join in Justice Feldman's dissent as to that part.

Charles E. Jones, Chief Justice

No. 03-286

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2003

STATE OF ARIZONA, Petitioner,

v.

KEITH ROYAL PHILLIPS, Respondent.

Brief in Opposition to
Petition for a Writ of Certiorari to the
Supreme Court of Arizona

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Respondent believes that, if certiorari were granted, this case would present the following questions:

1. Whether this Court has jurisdiction to review the Arizona Supreme Court's state law based criminal procedure decision below.

2. Whether the Arizona Supreme Court violates federal law by choosing to order resentencings in capital cases in which constitutional error occurred at the sentencing phase, an alternative left open to the States by this Court's decision in *Clemons v. Mississippi*, 494 U.S. 738 (1990).

3. Whether a complete denial of the right to jury trial on sentence enhancing factors, recognized by this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), is structural error that cannot be held harmless.

4. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), extends to eligibility factors that involve convictions for other criminal conduct.

5. Whether the right to a jury determination of sentence enhancement factors recognized by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), applies to eligibility factors that involve a balancing and qualitative assessment of aggravating circumstances.

6. Whether judge only capital sentencing violates the Sixth, Eighth or Fourteenth Amendments.

7. Whether resentencing is still required where the unconstitutional finding of one aggravating factor was not, and could not be, deemed harmless.

8. Whether the Eighth Amendment principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), permit state courts to disregard evidence of mitigating circumstances because they were arguably not shown, by a preponderance of the evidence, to have caused the crime.

9. Whether, consistent with the Sixth, Eighth, and Fourteenth Amendments, the Arizona Supreme Court could have reaffirmed Respondent's death sentence without allowing the merits of his individual case to be argued or presented in any fashion.

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JURISDICTION

Respondent contests this Court's jurisdiction over the Question Presented For Review in the certiorari petition, and also over the state law questions the Petition seeks to raise for the reasons set forth below.

The Question Presented For Review by the State is:

> **Did the Arizona Supreme Court err holding that *Ring II* requires not only a jury determination of an aggravating factor rendering the defendant eligible for the death penalty, but also a jury determination of mitigating circumstances and whether mitigating circumstances are sufficiently substantial to warrant leniency? (Emphasis Added.)**

Respondent argues in the Petition that the answer to this Question is "yes", and that the Arizona Supreme Court erroneously held in *State v. Ring*, 65 P.3d 915 (2003)("hereinafter "*Ring III*"), that this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), (hereinafter "*Ring II*"), requires jury determination of mitigating circumstances as well as the aggravating factors required to render a defendant eligible for the death penalty. (Pet. For Cert. at 7-8, 10.) Petitioner specifically argues that:

> **The Arizona Supreme Court held in the instant case that under *Ring II*, there is a Sixth Amendment right to a jury determination of whether mitigating circumstances exist and whether those circumstances are sufficient substantial to warrant leniency. *Phillips*, 67 P.3d 1228 at ¶¶13-15.**

(Id. at 8.) The Question Presented For Review is therefore based on the predicate factual issue of whether the Arizona Supreme Court in fact held in *Ring III* that *Ring II* requires a jury to determine the existence of mitigating circumstances. To support its position, Petitioner cites *Ring III*, *supra*, *at 204 Ariz. 534 at* ¶¶ 50, 63, 88-89 and *State v. Phillips*, 67 P.3d 1228, 1231-1232, ¶¶13-15 Ariz. 2003. (hereinafter "*Phillips II*"). These cases, however, do not in any way support its contention that the Arizona Supreme Court has held

that *Ring II* requires a jury trial for mitigating circumstances. Fairly read, those sections hold only that the harmless error analysis adopted by the Arizona Supreme Court in *Ring III* requires consideration of the mitigating circumstances of each defendant's case, not that *Ring II* requires a jury to determine the existence of mitigating circumstances. Id.[1] Thus, Petitioner's contention that the Arizona Supreme Court held in *Ring III and Phillips II*, *supra*, that this Court held in *Ring II* that a jury must determine the existence of mitigating circumstances is clearly incorrect. Since the Question For Review is entirely based on that erroneous factual premise, the Question is not a *bona fide* question for this Court's certiorari review, and the Petition should be denied.

Moreover, even assuming *arguendo* that Petitioner has presented a *bona fide* federal question for certiorari review, this Court should still deny the Petition, because Petitioner's request for review of this issue is untimely. Rule 13(1) of the Rules of the Supreme Court of the United States requires a petition for writ of certiorari to be filed within 90 days of judgment or denial of discretionary review by the state court of last resort. A petition which is "jurisdictionally out of time will not be filed by this Court." Rule 13(2), Supreme Court Rules. Petitioner contends that the Arizona Supreme Court held in *Ring III* that *Ring II* requires jury determination of mitigating circumstances. Assuming that this contention is correct (which it is not), the legal issue of whether *Ring II* requires jury determination of mitigating circumstances, as well as aggravating circumstances, is a legal issue that was ripe for judicial review by this Court on April 3, 2003, the date that *Ring III*

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[1] As stated in detail *infra*, the Arizona Supreme Court's consideration of mitigating circumstances in its harmless error analysis adopted in *Ring III* is entirely consistent with this Court's decision in *Clemons v. Mississippi*, 454 U.S. 738 (1990).

was decided by the Arizona Supreme Court. Whether a legal issue is ripe for judicial resolution under Article III of the United States Constitution is based upon an evaluation of:

> **both the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration.**

Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99 (1997). In *United States v. Quinones*, 313 F.3d 49, 56-60 (2nd Cir. 2002), the court applied the *Abbott* test, *supra*, to the issue of whether an appeal of a pretrial challenge to the facial constitutionality of the Federal Death Penalty Act was ripe. The court held the pretrial challenge was ripe for judicial appellate review under Article III because (i) the issue of the constitutionality of the statute was a "pure question of law" and (ii) a defendant charged under the statute would be subject to hardship and "suffer[] practical and legally-cognizable disadvantages" if resolution of the issue were postponed. *Quinones*, *supra*, 313 F.3d at 58-59.[2]

Based on these principles, the issue raised by Petitioner was ripe for appellate review on April 3, 2003 when *Ring III* was decided. The issue of whether *Ring II* requires jury determination of mitigating circumstances is a pure question of constitutional law which was fit for judicial resolution on April 3, 2003. *Abbott Laboratories*, *supra*, 387 U.S. at 148-149; *Quinones*, *supra*, 313 F.3d at 59. In addition, the delay by Petitioner in requesting this Court to review this issue has caused substantial hardship to defendants, like Respondent, whose cases have already been remanded for jury sentencings after decisions by the Arizona Supreme Court finding that the *Ring II* errors in their cases were not

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[2] Specifically, the court held that postponement of the resolution of the issue would impact *inter alia* the defendant's decision of whether to plead guilty and also the defendant's tactical decisions during voir dire and the trial itself. *Id.* at 59.

harmless" under the methodology set out in *Ring II*.[3] Ten other defendants are in the pre-decision phase of their direct appeals and have not yet undergone the harmless error analysis adopted by the Arizona Supreme Court in *Ring III*. It is certain that all of these defendants have already made legal, tactical and other important decisions in their cases based upon *Ring II*, *Ring III* and the revised versions of §13-703, §13-703.01, et seq. See *Quinones*, *supra*, 313 at 56-60. Delayed consideration by this Court of the untimely Question Presented by Petitioner will cause confusion, chaos and prejudice in the cases of Respondent and the other *Ring III* defendants, as well as the rest of the Arizona capital system, and Petitioner's untimely request for certiorari review should be rejected.

Respondent's opposition to Petitioner's claim of jurisdiction in this Court therefore can be summarized as follows. The Question Presented requests certiorari review by this Court of the legal issue of whether *Ring II* requires jury determination of mitigating circumstances and whether the Arizona Supreme Court held that to be the law in *Ring III*, which was decided on April 3, 2003. For the reasons set forth above, that Question was ripe for appellate review and resolution on April 3, 2003, and Petitioner's Petition should therefore have been filed within 90 days of that date, which was July 2, 2003. Petitioner did not file its Petition, however, until August 4, 2003, and the Petition is therefore untimely

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[3] *Phillips II*, *supra*; *State v. Dann*, 74 P.3d 231 (2003); *State v. Lamar*, 72 P.3d 831 (2003); *State v. Jones (Antoin)*, 72 P.3d 1264 (2003); *State v. Canez*, 74 P.3d 932 (2003); *State v. Prince*, 75 P.3d 114 (2003), *State v. Ring*, 2003 WL 22064328 (filed September 5, 2003); *State v. Cropper*, 2003 WL 22064329 (filed September 5, 2003); *State v. Rutledge*, 2003 WL 2213345 (filed August 16, 2003); *State v. Pandeli*, 65 P.3d __ Ariz. (2003); *State v. Prasertphong*, 2003 WL 22039960 (filed September 2, 2003); *State v. Tucker*, 68 P.3d 110 (2003); *State v. Lehr*, 205 Ariz. 7, 68 P.3d 50 (2003); *State v. Harrod*, 204 Ariz. 567, 65 P.3d 948 (2003); *State v. Finch*, 68 P.3d 123 (2003); *State v. Prince*, 75 P.3d 148 (2003).

under Rule 13(1) of this Court. *See United States v. Kress*, 58 F.3d 370, 373-374 (8th Cir. 1995)(appellate issues waived because not raised when issues first became ripe in original appeal). Since the Petition is untimely, Respondent requests this Court to dismiss it pursuant to Rules 13(1) and (2) of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those authorities set forth in the Petition, this case involves the Tenth Amendment to the Constitution of the United States, which provides:

> **The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.**

This case also involves A.R.S. §§ 13-703 and 13-703.01, copies of which are set forth in Appendix A.

STATEMENT OF THE CASE

1. Arizona Capital Punishment Law After *Ring v. Arizona*

Immediately after this Court's *Ring* decision, the Arizona legislature was convened in special session to enact a new death sentencing statute. That statute was expressly made applicable to all cases in which direct appeal had not been finally resolved. 2002 ARIZ. SESS. LAWS, 5th S.S., Ch.1, § 7(A). The statute provided for a jury determination of all issues relating to guilt and sentence: defendant's guilt of first degree murder, the presence of aggravating circumstances, and the existence of sufficient mitigating circumstances to outweigh the aggravating circumstances. A.R.S. § 13-703.01.

Shortly thereafter, the Arizona Supreme Court consolidated all capital cases before it on direct appeal, including Mr. Phillips', for argument in *Ring III*. In its decision in that case, the court determined that contrary to the defendants' arguments, violations of *Ring II*'s jury trial right could be held harmless. *Ring III*, 65 P.3d at 933-936. The court held that

a sentence could be affirmed on the theory that the error was harmless, if and only if the court could conclude, that "no reasonable jury would have failed to find the factor established beyond a reasonable doubt" and "that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* at 946. This standard is substantially the same as Arizona's pre-*Ring II* law regarding other forms of constitutional error in capital sentencing decisions by judges. *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)(refusing to affirm death sentence "[w]here there is a doubt whether the death sentence should be imposed"). However, it had another basis as well: the Arizona Supreme Court's determination that the legislature's intent would be frustrated if different sentencers evaluated the presence and strength of aggravation and mitigation. *Ring III*, 65 P.3d at 943; *see also State v. Bible*, 858 P.2d 1152, 1212 (1993)(expressing strong preference for remand where there is error in a capital sentence because fairness and accuracy are promoted by single factfinder who can consider all evidence).

2. Respondent's Case.

A. Mr. Phillips' Childhood.

Keith Royal Phillips was born on August 14, 1977 and was 20 years old at the time of his arrest. He suffered an exceedingly chaotic, abusive childhood. His mother decided initially to give him up for adoption, then changed her mind, and then gave him to her brother Royal and his wife Terry when Mr. Phillips was 18 months old. (RT 6/14/99 at 15-20.) These caretakers inflicted continuing, and serious, physical and emotional abuse over the next 14 years. Mr. Phillips had marks on his body "most of the time [he] could remember." (RT 6/14/99 at 15.) The abuse worsened as he grew older. In addition to suffering physical abuse, Mr. Phillips also suffered sexual abuse from a "family friend" when he was 8 years old.

When he was 14, his "father" pushed his head into a wall because he was talking to his girlfriend on the phone. (Pen. Phase Evid. Exs. 17 at 11, 26 at 16-18; Agg./Mit. Ex. J at 3). The girlfriend reported the abuse to County authorities, who commenced a several month investigation that resulted in Mr. Phillips being placed in foster case after he had also run away because he was being "punched and hit and kicked."[4] (Agg./Mit. Ex. A "Penalty Phase Evidence" Exs. 22, 26 at 14; Agg./Mit. Exs. D at 11-14, D-1, E at 11, E-L1, G at 11-14, G-1, J at 3; ROA 356, Exs. 38 at 5, 53 at 1-4, 58 at 5-7.) The court found Mr. Phillips "at risk of injury to person or health, mental or physical," ordering him to remain under the care and custody of the State. (Pen. Phase Evid. Ex. 14). The court ordered counseling and evaluations for the family members. Id.

Mr. Phillips was subsequently allowed to return to the "home" on conditions of further family counseling, monitoring, and preventive services. The very next month, Mr. Phillips was admitted to the hospital in Syracuse, New York because he was extremely depressed and suicidal. (Pen. Phase Evid. Ex. 21.) He told his attending physician, that his parents had just informed him they were giving him back to his "Aunt Wendy", Wendy Sexton, who

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[4] The allegations included, inter alia, (1) that Royal punched and kicked Mr. Phillips, knocking him to the ground and causing an injury to his face by his eye. His mother stood by. Then Royal made him get out of bed to do 50 pushups; (2) that Royal slapped him in the face with a loaded paintbrush, getting paint in his eyes, whereupon Royal tossed him a paint thinner-soaked rag and told him to wash his eyes out with it; this burned; (3) that Royal punched him and threw him in a truck, then made him strip so he could beat him with the buckle-end of a belt, causing bruises to his back, neck, legs, and face; (4) that Royal hit him with a piece of wood in his lower abdomen, causing a lump, and that hewas then unable to stand or urinate or attend school; Royal told him to lie about this and call it a "canoeing accident"; (5) that Royal threw a football at his face, which he attempted to block with his hand, resulting in his finger being snapped; his finger remains crooked. (Pen. Phase Evid. Exs. 17, 22, 25, 26.) These incidents were corroborated by outside witnesses, and some were admitted by Royal. (Id.) Mr. Phillips had numerous hospital admissions as well, including (1) 1981 lacerated tongue; (2) 1988 scalp laceration; (3) 1991 possible concussion from a blow to the back of head; (4) a "skiing" accident that occurred at 8:30 p.m. one night in 1991, which caused a broken collarbone. (ROA 356 Ex. 38.)

was actually his biological mother, and a drug and alcohol addict living in San Francisco. The Phillips no longer wanted him, as he had "blown the whistle" on their abuse, and he returned to San Francisco with his mother. (ROA 356 Ex. 36 at 3.) Mr. Phillips' mother did not parent him; she neglected him, except she did smoke a lot of marijuana with him. "She simply didn't care what [he] did." (Agg./Mit. Ex. J at 4; ROA 356 Ex. 36 at 3).

Mr. Phillips attended an inner-city school in San Francisco. (ROA 356 Exs. 36 at 3, 45, 46, 58.) In February of 1993, when Mr. Phillips was 15, he ran away from home, and was arrested for participating with two other minors in a theft. (Id,. Ex. 58 at 3-4.) He told a psychologist after his arrest that he was using alcohol, marijuana, and LSD on a daily basis. (ROA 356 Ex. 58 at 4-8.) Mr. Phillips was diagnosed as having an identity disorder of adolescence. As a result of the offense, Mr. Phillips was sent to the Arizona Boys Ranch in Oracle, Arizona. (ROA 356 Exs. 36 at 4, 45 at 4, 49.) He adapted well to the Ranch for most of the time he was there, but eventually became suicidal and slashed his wrists while there. (Id. at 5.)

After leaving the Ranch in 1995, Mr. Phillips began to drink. (Agg./Mit. Ex. J at 5.) He married in 1996 and became a stepfather to his wife's two daughters. (PSR CR-61684 at 3; ROA 356 Ex. 59.) Soon after his marriage, Mr. Phillips enlisted in the Navy. (ROA Exs. 45 at 4, 51; Agg./Mit. Ex. J at 4-5; PSR CR-61684 at 3.) Because he had insufficient contact with his family in the Navy, he became depressed and suicidal and slashed his wrists again. (Id.) The Navy agreed to a general discharge in October, 1997. (Id.) Mr. Phillips returned home to his family in Tucson, but became extremely depressed because he thought he had failed to take advantage of the opportunities the Navy had offered. (Id.)

It was at this time that he met Marcus Finch, a crack addict who is 7 years older than Mr. Phillips, and continued his lifelong pattern of substance abuse that had begun in childhood.(Agg./Mit. Ex. J at 5; PSR CR-61684 at 3; ROA 403 at 1.) Mr. Phillips not only

began to abuse alcohol, but also took marijuana, LSD, cocaine and Valium. (Id.) When his substance abuse went out of control, he was fired from his job. (Id.) He then began to use crack provided to him by Mr. Finch just before the instant offenses began. (Id.) He was using crack and other substances such as Valium and cocaine during all of the offenses in this case, described below.

B. The Crimes.

1. Famous Sam's Valencia Road.

Mr. Phillips and Mr. Finch were charged with Counts 28 through 56 of the Indictment for offenses committed during an armed robbery at the Famous Sam's bar and restaurant on Valencia Road in Tucson on April 28, 1998. (ROA at 1.) The conviction of Count 28 was for the first degree murder of one of the patrons. Margaret Damron testified at the dual jury trial that she was working the bar on the night of April 27, 1998. (RT 2/11/99 at 69-72.) After midnight, some customers were playing pool, and some were sitting at the bar on the other side of the building. (Id. at 71-74.) At approximately 12:30 a.m., Mr. Finch came in the front door on the southeast part of the building. (Id. at 75-78.) He asked how much a Killian's Red beer was. (Id. at 78-79.) He said he was going to his car to get some money. (Id.) He left, then came back after about a minute and sat at the bar and ordered a beer. (Id. at 79-80.) After checking his ID, Ms. Damron served him. (Id. at 79-80.) Ms. Damron then went to the other end of the bar to speak to another patron, Sandra Sellards. (Id.) When she looked back, however, Mr. Finch was no longer there. (Id. at 80.) She then saw Mr. Phillips walk through the front door carrying what appeared to be a sawed-off rifle or shotgun. (Id. at 81.) He turned right toward the video games, and fired six shots, injuring two patrons who were sitting at the bar. (Id. at 50-67; RT 2/16/99 at 77-85.)

Ms. Damron and Ms. Sellards ran into the cash office and locked the door. (Id. at 81-82.) Ms. Damron saw Mr. Finch running in the direction of the pool tables holding a

black handgun. (Id. at 83-84.) Ms. Sellards dialed 911 from the office phone and then hid under the back counter top. (Id. at 84.) Mr. Phillips broke into the office and saw the phone. (Id. at 85-86.) He smashed the phone with the butt of his gun, then pointed his gun at Ms. Damron's head and told her to "give me the money". (Id.) Ms. Damron said that the key for the drawer was out at the bar. (Id. at 86.) He let her get the key. (Id.) She came back and opened the drawer while he told her to "Hurry up" and "Give me the money, bitch". (Id. at 86.) When she got the drawer open, he held out his shirt and told her to put the money in it; Ms. Damron complied, and he left. (Id. at 86-87.)

Kory Siquieros testified that he was in the pool table area on the other side of the building when he heard what sounded like "firecrackers" going off. (Id. at 116-118.) He could hear, but not see, someone yelling "Get down on the floor." (Id. at 118.) As he got down, he saw his friends Kevin Hendricks and Preston Juan running out the back door. (Id. at 118-119, 127.) He then saw Mr. Finch run out the back door after them with a gun. (Id. at 119.) Mr. Finch shot and killed Mr. Hendricks as he was trying to escape.

2. Famous Sam's Silverbell Road.

At the same trial, Mr. Phillips and Mr. Finch were also charged with Counts One through Eleven of the Indictment, which were offenses committed at the Famous Sam's on Silverbell Road in Tucson on April 12, 1998. (ROA 1.)

Beverly Rochon was tending bar on April 12, 1998 at the Famous Sam's on Silverbell Road in Tucson. (RT 2/9/99 at 88-90.) While she was closing, sometime after 1:00 a.m., Mr. Finch and Mr. Phillips entered the bar with guns through the back door. (Id. at 94-95.) Mr. Finch charged directly at her and told her to get into the cooler. (Id.) He led Ms. Rochon into the walk-in cooler and pushed her in. (Id. at 95-97.) The men stood in the doorway of the cooler waving their guns demanding money. (Id. at 105). Then Mr. Finch began waving his gun and "screaming profanities." (Id. at 107-108.) Ms. Rochon led Mr.

Phillips to the cash room, and he kicked the door down because she did not have the key. (Id. at 107-109.) He held the gun to her head, telling her to give him the money or he would kill her. (Id. at 109-110.) He took the cash box and cash from the drawer. (Id. at 109-110.) Waitress Shelly Raab testified that Mr. Finch ran up to her with a shotgun; her reaction was to drop to her knees. (Id. at 67-73.) Mr. Finch pointed the gun at her chest and told her to "get in the cooler, bitch". (Id. at 73-74.) Before she could move, however, he shot her in the chest. (Id. at 75.) She suffered serious injuries but did not die. (Id.)

3. The Firelite Lounge.

Mr. Phillips and Mr. Finch were also charged with Counts Twelve through Twenty-Seven, which were for offenses at the Firelite Lounge. (ROA 1.) Count Twelve was for the attempted first degree murder of a patron. (Id.) Vince Hurtado testified that he was with friends at the Firelite Lounge in the early morning of April 12, 1998. (RT 2/10/99 at 186-188.) Mr. Finch came into the bar and asked for a beer. (Id at 190.) Mr. Phillips came in also and stood behind Mr. Hurtado. (Id. at 190-191.) Mr. Phillips then yelled "hit the floor, I'm not kidding, this is a hold-up". (Id.) Mr. Hurtado saw Mr. Finch was now pointing a handgun at the bartender. (Id. at 192.) Mr. Hurtado laid down next to his friend Bill Gilson. (Id.) Mr. Phillips then poked Mr. Hurtado in the back of his head with his gun and told him to give him his money, which he did. (Id. at 192-196.) He also saw Mr. Gilson throw something. (Id.) Mr. Phillips then told them all to get up and go into the bathroom. (Id. at 197-198.) As they all filed in, Mr. Hurtado heard two "pops" and felt Mr. Gilson fall against him. (Id. at 199-200.) Mr. Gilson said that he had been hit. (Id. at 200.) Mr. Hurtado looked out, saw the men were gone, and called 911. (Id. at 201-202.) He identified Mr. Finch and Mr. Phillips in photo lineups in court. (Id. at 203-206; RT 2/11/99 at 11-16.) Mr. Gilson was seriously injured but did not die. (Id.)

C. The Death Sentence.

Based on the above evidence, Mr. Phillips' jury convicted him of all counts, except Counts 21, 30, 35-36, 44-46, 50 and 54. (ROA 203-249, 366.)

Based upon the facts set forth previously, Mr. Phillips proffered numerous statutory and nonstatutory mitigating factors. (ROA 355 at 1-10.) One of the factors proffered was the statutory mitigating circumstance under §13-703(G)(1) that his capacity to conform his conduct to the requirements of the law was significantly impaired. (ROA 355 at 4-5.)[5] As evidence of this factor, Mr. Phillips presented, *inter alia*, the testimony of Dr. Larry Morris, a clinical physhologist specializing in the subject of male survivors of abuse during childhood. (RT 6/14/99 at 7-9.)

Based on relevant factual information concerning Mr. Phillips and the offenses, Dr. Morris testified that Mr. Phillips exhibits, and has a history of, psychological symptoms characteristic of male survivors of child abuse, such as hypervigilance, substance abuse, depression, post-traumatic stress, dissociation, suicidal threats, built-up anger, self-mutilation, distrust, and nightmares of abusive experiences. (RT 6/14/99 at 20-45; Agg./Mit. Ex. J. at 5-8.) These symptoms, which are the result of Mr. Phillips' being abused, rejected, abandoned and neglected by "everyone significant in his life", show that Mr. Phillips is "very dysfunctional". (RT 6/14/99 at 41-42; Agg./Mit. Ex. J at 6.) Mr. Phillips also has several psychological disorders attributable to and characteristic of male survivors of an abusive childhood: (i) a borderline personality disorder, (ii) a mood disorder characterized by depression dysphoria, (iii) polysubstance abuse and (iv) post-traumatic stress symptomology. (RT 6/14/99 at 41-44; Agg./Mit. Ex. J at 6.) In addition, Dr. Morris

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[5] The additional factors proffered were (i) intoxication at the time of the offense, (ii) significantly impaired capacity (nonstatutory), (iii) age, (iv) history of substance abuse, (v) abusive and dysfunctional childhood, (vi) relatively minor participation in the murder under §13-703(G)(3) and as nonstaturoy factor, (vii) familial responsibilities, (viii) family support, (ix) remorse, (ix) liability for first degree murder based on killing by Mr. Finch, and (x) lack of intent to kill. (Id.)

opined that Mr. Phillips' offenses were "causally connected" with and "strongly related" to the above disorders. Moreover, Mr. Phillips was both sexually and physically abused, compounding his psychological problems; sexually abused male children develop additional problems with anger and substance abuse; physical abuse within the home combined with sexual abuse outside the home is a particularly frightening situation so special survivor mechanisms are developed because the child is left literally with no safe place. Anger and drug abuse help children develop a "safe place". (Id. at 20-24.) Mr. Phillips' mental disorders would also cause him to act impulsively. (Id. Based on the above, Dr. Morris concluded that Mr. Phillips' mental disorders resulting from his childhood abuse, neglect and rejection alone would have affected his capacity to control his actions at the time of the offenses, and that his use of drugs such as crack at the time of the offenses would clearly have impaired that capacity. (Id.) Based on Dr. Morris' expert testimony and the factual record in this case, Mr. Phillips argued that he had established by a preponderance of the evidence the mitigating factor in §13-703(G)(1).

The State two proffered aggravating factors. One was that Mr. Phillips had been previously convicted of "serious offenses" under §13-703(F)(2). This factor was based upon (i) the "serious offenses" he was convicted of at trial, which included aggravated assault and armed robbery and (ii) Mr. Phillips' conviction of three serious offenses in Pima County Case No. CR-61684, an armed robbery of the Silverroom bar, which the State alleged Mr. Phillips committed by himself on April 26, 1998. The other aggravating factor proffered by the State was that Mr. Phillips committed the offenses for "pecuniary gain" under §13-703(F)(5).

Based upon the aggravation and mitigation submitted, the trial court issued a Special Verdict imposing a sentence of death on Mr. Phillips for his first degree murder conviction. The court found that the death eligibility standard of Enmund v. Florida, 458 U.S. 782

(1982) and Tison v. Arizona, 481 U.S. 137 (1987), was met. (Id. at 1-2.) (ROA 370.) The court also found that the State had proven the aggravating factors of §13-703(F)(2) and (5) beyond a reasonable doubt. (Id. at 2-3.) The court also rejected virtually all of the proffered mitigating evidence as not being "mitigating". (Id. at 4-6.)[6] The court therefore held that the mitigating evidence offered did not outweigh the aggravating factors, and imposed death. (Id. at 1-6.) All of this was accomplished by the trial court acting alone, and not by a jury.

D. The Appeal.

In *State v. Phillips*, 46 P.3d 1048 (Ariz. 2003) (hereinafter "*Phillips I*".) the Arizona Supreme Court vacated Mr. Phillips' conviction of premeditated first degree murder based on insufficient evidence. The court affirmed Mr. Phillips' conviction of felony murder, however, and also affirmed his death sentence. *Phillips I* at 1059-1062, ¶¶49-82. The court held, however, that the trial court erred in relying on Mr. Phillips' convictions from the Famous Sam's Valencia Road offenses on April 28, 1998 to support the prior serious offense aggravating factor under §13-703(F)(2). *Id.* at 1059-1060, ¶¶56-57. The court held that the factor was properly found, however, based on the convictions from the Famous Sam's Silverbell Road and Firelite Lounge offenses, and from Mr. Phillips' three convictions in Pima County Case No. CR-61684 in September of 1998. *Id.*

Following this Court's decision in *Ring II*, and based upon the harmless error test set forth in *Ring III*, the Arizona Supreme Court reviewed Mr. Phillips case to determine whether the *Ring II* error in his case was harmless error. *Phillips II*, *supra*. The court affirmed the finding of the (F)(2) prior serious conviction aggravating factor based upon its decision in *Ring III* that this factor is exempt from the jury trial requirement of *Ring II*. See

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[6] The only mitigating factor the court found to be proven was family support, and the court found this factor to have "no weight". (Id. at 5.)

Phillips II, at 67 P.3d at 1230, ¶¶4-5, *Ring III*, *supra*, 65 P.3d at 936 ¶¶54-68.

The court stated that the (F)(2) factor was supported by the 25 convictions from the Famous Sam's Silverbell and Firelite Lounge incidents, and his convictions in CR-61684 in September of 1998. Id. However, the court held that the error in the finding of the pecuniary gain factor of §13-703(F)(5) was not harmless error, based upon the fact that it was Mr. Finch, and not Mr. Phillips, who shot the victim, and that there was "little evidence as to Phillips' intent and motivation regarding Finch's killing of Hendricks", and the court therefore could not say that "a jury would be unreasonable to conclude that Phillips' participation in the murder was motivated by something other than pecuniary gain". Id. at 1230-1231, ¶¶10-11. The court further held, based upon its harmless error analysis in *Ring III*, which includes a review of the mitigating evidence in the case, that it could not say that "a reasonable jury would not have found additional mitigating factors or weighed differently the mitigating factors that were found." Id. at 1231, ¶14.[7] The court therefore remanded Mr. Phillips' case for the jury sentencing required by *Ring II*, and amended §§13-703 and 13-703.01, which required a jury determination on aggravating and mitigating circumstances, and the weighing of those factors to determine if death should be imposed. Id. at ¶15.

Respondent now requests this Court to deny the Petition.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT'S DECISION BELOW RESTS ON AN INTERPRETATION OF STATE PROCEDURAL LAW, AND REACHES A RESULT THIS COURT SAID WAS PERMISSIBLE IN *CLEMONS V. MISSISSIPPI*.

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[7] The court noted that Mr. Phillips had offered "more than 10 mitigating circumstances for the court's consideration" and that the trial court had only found two such factors to be present. Id. at ¶14. As stated above, Mr. Phillips reading of the trial court's Special Verdict is that only one mitigating circumstance, family support, was found by the trial court, and that was given no weight.

For the reasons stated below, the harmless error analysis adopted by the Arizona Supreme Court in *Ring II* is to determine whether *Ring II* error is harmless is completely consistent with *Clemons v. Mississippi*.

In *Ring III*, the Arizona Supreme Court held that the existence of one aggravating factor which is either exempt from *Ring II*, implicit in a jury's verdict, or supported by overwhelming or uncontroverted evidence, does not end that court's harmless error inquiry. The court explained that "the procedures urged by the State [to end the harmless error inquiry after the finding of one aggravator is deemed harmless] do not reflect any sentencing procedure ever adopted by our legislature." *Ring III*, 65 P.3d at 943. The court went on to describe the consistency of Arizona's statutory capital sentencing scheme that has always "assigned to the same fact-finder the responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency." *Id.* The court explained "[t]he process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. [It refused to] speculate about how the State's proposal would impact this essential process." *Id.*

The court later discussed the need to have mitigating circumstances included in its review of error under *Ring II* for harmless error: "Arizona's statutes require more than the presence of one or more statutorily defined aggravating factors to impose the death penalty." *Id.* at 946. Citing Arizona's statutes, the court concluded: "[b]ecause a trier of fact must determine whether mitigating circumstances call for leniency, we will affirm a capital sentence only if we conclude, beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency." *Id.* This result is permissible under this Court's jurisprudence and dictated by the nature of Arizona's capital sentencing scheme.

Arizona is a weighing state. *See State v. Richmond*, 886 P.2d 1329 (1994). In *Clemons*, this Court held that when constitutional error occurred in a capital sentencing, appellate courts in weighing states could conduct harmless error review, but also could remand for resentencing. *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990)(decision to reweigh or remand "is for state appellate courts. . .to make.")(footnote omitted). As explained above, the Arizona Supreme Court has decided, in deference to the Arizona legislature's policy of requiring pure jury sentencing, it should remand in all cases where it cannot say beyond a reasonable doubt that no reasonable jury would have imposed death. That is clearly a permissible choice under *Clemons*, and the Arizona Supreme Court's determination in *Ring III* of the form that that harmless error review should take, and the result that review should have in cases such as Respondent's, was reasonable and well within the parameters set by this Court in *Clemons*.

This Court does not sit to review such decisions of state law, state criminal procedure and state sentencing policy. *See* Sup.Ct. R. 10; *Coleman v. Thompson*, 501 U.S. 722, 730 (1991)("if resolution of a federal question cannot affect the judgment, there is nothing for th[is] Court to do."). This Court has given its guidance regarding the Sixth Amendment in *Ring II*. It now should "give state judges a clear[ ] opportunity to develop state jurisprudence unimpeded by federal interference." *Arizona v. Evans*, 514 U.S. 1, 7 (1995), quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Arizona's decision to include mitigating circumstances in its harmless error review in *Ring III* does not offend or contravene anything in the federal constitution, or this Court's applicable decisions. To the contrary, it is a choice specifically left open to the states by *Clemons*, and by *Ring II*. *Ring II*, 536 U.S. at 609, n.7. The exercise of that choice does not call for certiorari review by this Court.

Petitioner emphasizes the different results obtained by several state courts in applying *Ring II* to individual state sentencing schemes. This result, however, obtains because each state sentencing scheme is unique, and each state's law must be applied to that scheme in light of state policy and practice. As noted in *Ring III*, the Nevada Supreme Court's decision on this issue in *Johnson v. Nevada*, 59 P.3d 450 (Nev. 2002), was controlled by Nevada law.[8] Similarly, in *Woldt v. People*, 64 P.3d 256 (Colo. 2003), the Colorado Supreme Court held that Colorado's "three-judge panel capital sentencing statute. . .is unconstitutional on its face under *Ring*" but that defendants sentenced under that statute were entitled to resentencings "under Colorado law[.]" 64 P.3d 256, 262 (Colo. 2003). The court cited to Colorado law interpreting the Colorado death penalty statute in determining which jury findings were eligibility findings. *Id*, at 264 (quoting *People v. Dunlap*, 975 P.2d 723 (Colo. 1999). Thus, the legal landscape developing after *Ring II* may not be homogeneous, but it is not in conflict. Each state has applied this Court's decision to their state capital punishment laws and, as long as those decisions do not violate the requirements of *Ring II* and *Clemons*, that is all this Court requires.

The state complains that twenty-six capital cases will be affected by this decision. However, of the 31 cases on direct appeal when *Ring II* was announced, at least seven have been resolved on grounds other than *Ring II*, and in an additional three cases similar to Mr. Phillips', the time for petitioning for certiorari has already run without a petition from the state. At this rate, only this and a handful of other cases would be affected were this

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[8]The court held: "Nevada statutory law requires two distinct findings to render a defendant death-eligible: 'The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.' This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing." *Johnson v. State*, 59 P.3d at 460 (italics in original)(footnote omitted).

Court to accept, wholesale, Arizona's arguments in this petition. Even then, given historical error rates in Arizona, the sentences in most of those cases would be eventually reversed in later proceedings. *See* James S. Liebman, et. al., *A Broken System, Part II: Why there is so much error in capital cases, and what can be done about it* (visited Sept. 26, 2002), http://www.law.columbia.edu/brokensystem2>. Rather than delay capital proceedings in Arizona for yet another year, fairness and judicial economy favor allowing the jury resentencings that the Arizona courts have ordered, under the new statutory procedures the Arizona legislature has prescribed, to begin.

Finally, Petitioner's contention that Mr. Phillips' death sentence should be affirmed because his aggravating factor under §13-703(F)(2) was upheld by the Arizona Supreme Court should be rejected in this case for several reasons. First, the weight of that factor has been substantially lessened since the time that factor was originally found by the trial court. As stated above, the Arizona Supreme Court held that the trial court erred in using his convictions of serious offenses relating to the Famous Sam's Valencia Road incident as prior serious offenses to support the (F)(2) aggravating factor. This means that the number of convictions from Mr. Phillips jury trial in case which were used to support the (F)(2) factor have been reduced by approximately 28 convictions, leaving approximately 25 convictions from the jury trial to support (F)(2). See *Phillips II*, supra, 67 P.3d at 1230, ¶¶4-5. In addition, Mr. Phillips' convictions in Pima County Superior Court Case No.61684 have been vacated as a result of the granting of Mr. Phillips' Petition For Post-Conviction Relief in that case on the ground of ineffective assistance of counsel. (See Appendix C.) This Court's decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988), therefore precludes the use of those convictions to support the (F)(2) aggravating factor and use of those three vacated convictions as aggravation would violate the Eighth Amendment. This further reduces the number of convictions supporting (F)(2) factor from 25 to 22 convictions. Due

to the significant reduction of convictions which can be used to support (F)(2), the weight of that aggravating factor has been substantially reduced. Since Arizona is a weighing state, and since weighing of the now vacated convictions would violate the Eighth Amendment, the (F)(2) factor cannot simply be affirmed, and must be reweighed. *See Clemons, supra*; *Stringer v. Black* 503 U.S. 22 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992).

In addition, and as stated above, Mr. Phillips' conviction of premeditated murder was vacated by the Arizona Supreme Court in *Phillips I*, and that further changes the balancing of the aggravation and mitigation by increasing the mitigation side of the balance with mitigating factors. See e.g. *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70, 82-83 (1983)(mitigating that defendant did not kill victim and had no intent to do so). Thus, this is another change to the balancing of aggravating and mitigating circumstances which requires that Mr. Phillips' aggravation and mitigation be reweighed, and prohibits simple affirmance of his death sentence, which is what the State seeks at this time.

Finally, the result requested by Petitioner, which is simply to affirm Mr. Phillips' death sentence because the (F)(2) factor has been found to be valid on appeal, is an unconstitutional remedy in a weighing State such as Arizona, and is appropriate only in a non-weighing state. *See Stringer, supra*, at 229-231.

II. THE ARIZONA SUPREME COURT'S DISPOSITION OF THIS CASE CAN AND SHOULD BE AFFIRMED ON OTHER GROUNDS.

If certiorari were granted, this Court would have to consider whether the Arizona Supreme Court's decision is correct for other reasons that were argued to it, but not necessarily adopted by it before considering relief on the grounds urged by Petitioner. There are a number of such reasons which should lead this Court to affirm the decision below. *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991)(decision may be affirmed on grounds other than those stated by lower court).[9]

A. Denial of the Jury Trial Right Guaranteed by Ring is Structural Error That Should Not be Subject to Harmless Error Review.

This Court has held that unlike "an error in the trial process itself . . . structural defects in the constitution of the trial mechanism" can never be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). Thus, this Court has refused to find harmless error when the right to jury trial has been "altogether denied," because in such a case "the wrong entity judged the defendant guilty." *Rose v. Clark*, 478 U.S. 570, 578 (1986).

That is precisely the case here. The error was not one by the trial judge, or in the trial process, but rather in the statutory structure governing capital sentencing – a classic "structural defect in the constitution of the trial mechanism" – that "altogether denied" capital defendants their Sixth Amendment right to have eligibility determinations made by a jury beyond a reasonable doubt. The Arizona statute assigned to the "wrong entity" – the judge – the job of determining the defendant's guilt as to those determinations. As the two *Ring III* dissenters recognized, harmless error review in cases like this "puts the [appellate

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[9]Because Respondent is not seeking to change the judgment below, which properly ordered a full sentencing retrial, he has not filed a formal cross petition raising these issues, but would seek to have these issues considered in the event certiorari were granted. *See* ROBERT L. STERN, ET. AL, SUPREME COURT PRACTICE, at 363-364 (7th ed. 1993).

court] in the position of speculating about one of the great unknowables-what a non-existent jury would have done." *Ring III*, 65 P.3d at 948 (Feldman, J., concurring in part and dissenting in part). Harmless error analysis cannot apply in such a case. See also Summerlin v. Stewart, 2003 WL 22038399 (filed September 2, 2003) at *31-34 (*Ring* error structural error).

B. The Jury Trial Right Recognized in Ring Properly Applies to Aggravating Factors Involving Convictions for Other Criminal Conduct: Almenderez-Torres Should be Overruled.

As Justice Thomas' concurrence in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) shows, this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), suffered from the same constitutional error as *Walton v. Arizona*, 497 U.S. 639 (1990). Petitioner argues that the prior conviction aggravating circumstance found by the trial judge should have determined the outcome here because it exempts the case from the decision in *Ring II*. Thus, if certiorari were granted here, the case will necessarily present the threshold question of whether, in light of the history reviewed there and in *Ring II*, this Court should overrule *Almendarez-Torres*.

The Arizona Supreme Court relied on *Almendarez-Torres* in finding the trial judge's determination of the prior conviction aggravating factor harmless. This is problematic for several reasons. First, it misapprehends the holding in *Almendarez-Torres*. As *Apprendi* noted, the defendant in *Almendarez-Torres* pleaded guilty, and in so doing, both waived his right to jury trial and admitted the previous felony convictions. Thus, the case before this Court only dealt with the sufficiency of the underlying indictment under the Fifth Amendment, and presented "no question concerning the right to a jury trial." *Apprendi*, 530 U.S. at 488. That question was presented in *Ring II*, where this Court held that "[c]apital defendants . . . are entitled to a jury determination of *any* fact on which the legislature conditions an increase in their maximum punishment." *Ring II*, 122 S. Ct. at 2432

(emphasis added). The fact of prior conviction squarely meets that description. *See also Apprendi*, 530 U.S. at 487, 489-90 (holding that even assuming arguendo that *Almendarez-Torres* was correctly decided, it is "at best an exceptional departure" from the rule announced in *Jones* and *Apprendi*).

Moreover, Justice Thomas, voting with a five-member majority in *Almendarez-Torres*, repudiated his vote less than a year later, making clear that he now regards *Almendarez-Torres* as wrongly decided. *See Apprendi*, 530 U.S. at 518-21 (Thomas, J., concurring). Thus, it is plain that a five-Justice majority of this Court no longer adheres to that decision.

Third, even if *Almendarez-Torres* remains applicable in the application of *Ring II* in some states, its logic does not apply in Arizona. The statute at issue in *Almendarez-Torres* was a recidivist statute. This distinction compelled the result in that case because recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." 523 U.S. at 243 (citations omitted), and thus was not an element of the offense in question. *Id*, at 243-244. Arizona, conversely, elected in the capital context to make prior convictions not a penalty for recidivism, but an element of the crime of capital murder as much as any other aggravating factor listed in A.R.S. § 13-703(F). As that court has explained on numerous occasions:

> **Our death penalty statute is not a recidivist or enhancement statute used to warn convicted criminals or encourage reform. . .. The purpose of the aggravation/mitigation hearing is to determine the character and propensities of the defendant. . .. That a defendant has been found guilty of another offense for which life is imposable is directly relevant to this determination. . ..**

State v. Walden, 905 P.2d 974, 994-995 (1995)(citations omitted). Therefore, Arizona's death sentencing statute explicitly treats prior convictions as elements of the crime of capital murder, not as recidivist penalty enhancements, and thus does not fall within the

D. **The Logic of Ring II, and Developments Since Ring II, Make it Apparent That Judge Only Capital Sentencing is Unconstitutional Under the Sixth, Eighth and Fourteenth Amendments, and Spaziano and Cabana Should be Overruled.**

The Constitution requires special safeguards in capital cases. *Gregg v. Georgia*, 428 U.S. 153 (1976). In addition to all of the reasons set forth in Justice Breyer's concurring opinion in *Ring II*, the evidence of legislative and judicial agreement since *Ring II* that the weighing of aggravating and mitigating circumstances is an element of the crime of capital murder demonstrates juries must make the ultimate sentencing decision. If this Court grants Arizona's request for certiorari review, this Court should also consider that evolving standards of decency require that *Spaziano v. Florida*, 468 U.S. 447 (1984), be overruled on that basis.

Considering statutes enacted both before and after *Ring II*, 36 states have now given sentencing authority to juries. Only Montana and Nebraska fail to do so. MONT. CODE ANN. § 46-18-301; NEB. REV. STAT. § 29-2521. All but three of the 36 states make juries' determinations of sentence controlling.[10] This is an overwhelming indication that jury sentencing is required by the Eighth Amendment and is an established part of due process. *See Atkins v. Virginia*, 536 U.S. 304, 314-315 (2002)(discussing 18 states which prohibit execution of the mentally retarded in judging evolving standard of decency by legislative decision), *Enmund v. Florida*, supra at 789 noting that only eight states permitted death sentences in cases where defendant participated in underlying felony but did not attempt or intend to kill. Given the nearly unanimous enactment of jury sentencing by state

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[10]Only in Florida, Alabama, and Delaware do judges retain sentencing authority after the jury's decision is reached. FLA. STAT. CH. § 921.141; ALA. CODE § 13A-5-47 (1975); DEL. CODE ANN. Tit. 11, § 4209. In Florida, the jury's sentence determination must be considered and given great weight. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). Alabama requires the sentencing judge to consider the jury's recommendation of sentence before making its decision. ALA. CODE § 13A-5-47 (1975).

legislatures. Justice Breyer's dissent in *Ring II* is correct. *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Cabana v. Bullock*, 474 U.S. 376 (1986), should be overruled and these questions, too, will necessarily be included in the issues presented by this case, if certiorari is granted here.

E. **The Arizona Courts Violated *Lockett v. Ohio* and *Eddings v. Oklahoma* By Disregarding Mitigating Evidence Where It Is Not Shown To Cause The Defendant's Conduct At The Time Of The Crime.**

1. **Evidence of a Traumatic Family and Developmental History Is Relevant Mitigating Evidence.**

This Court has repeatedly stressed the important and unquestionably mitigating nature of evidence that a capital defendant suffered from childhood abuse, even when the evidence is completely unrelated to the crime for which the defendant is sentenced. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)("There can be no doubt that evidence of a turbulent family history, [and] of beatings by a harsh father ... is particularly relevant [to mitigation]."); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)(evidence of childhood abuse is relevant to a capital defendant's "moral culpability" and jurors must be allowed to consider that evidence in assessing punishment); *Burger v. Kemp*, 483 U.S. 776, 789, n.7 (1987)(there is "no doubt" that evidence of a defendant's "exceptionally unhappy and unstable childhood" is "relevant mitigating evidence"). This Court finds evidence of childhood abuse relevant and undeniably mitigating. And this Court does not restrict the consideration of mitigating factors to only those shown to have caused defendants' actions at the time of the crime. See *Williams (Terry) v. Taylor*, 120 S.C. 1495, 1512-1514 (2000)(reversing for defense counsel's failure to investigate and present evidence that documented childhood abuse). Evidence of childhood abuse must be considered as non-statutory mitigation, even if that evidence does not provide a legal excuse from criminal responsibility. *Eddings*, 455 U.S. at 114.

Obviously, extensive childhood abuse and neglect damages one's emotional health. "It defies reason and common experience to suggest that a youngster coming out of [a horrific environment] was largely unaffected and should be held accountable as any functioning adult." *State v. Hoskins*, 199 Ariz. 127, 14 P.3d at 997, 1031 (Zlaket, C.J., dissenting). As Chief Justice Rehnquist recognized, "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." *Santosky v. Kramer*, 455 U.S. 745 (1982). Although medical science is not yet fully capable of quantifying and tracing the causal relationship between such abuse and criminal behavior, medical literature does reveal how childhood physical abuse may have long-term negative repercussions for the defendant's ability to make appropriate judgments, to understand the consequences of his actions, and to control his behavior. Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications For The Death Penalty*, 77 N.C.L.REV 1143, 1185 (1999). Medical literature shows that sexual abuse is extraordinarily destructive to a child's psyche, especially for young males, in whom sexual abuse causes the most emotional and psychological distress, intense fear, anxiety, and stress. See e.g. *State v. Trostle*, 191 Ariz. 4, 951 P.2d 869, 884-886 (1997).

A sentencer must not be precluded from considering a capital defendant's proffered mitigating evidence of "any aspect of defendant's character, or record, and any of the circumstances of the offense" in all but the rarest of cases. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Evolving standards of decency and "the fundamental respect for humanity underlying the Eighth Amendment" require individualized sentencing "as a constitutionally indispensable part of inflicting the death penalty." *Eddings v. Oklahoma*, 455 U.S. at 114, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Evidence of childhood

abuse is relevant in sentencing because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable" than others. *Penry*, 492 U.S. 302, 319 (1989), quoting *California v. Brown*, 497 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The sentencing body must have a vehicle for assessing the mitigating nature of the evidence that reflected on the defendant's personal culpability to determine what sentence is warranted. *Penry*, 492 U.S. at 322. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114. Although courts "may determine the weight to be given relevant mitigating evidence[,]" they "may not give it no weight by excluding such evidence from their consideration." *Id.*, 455 U.S. at 115. Restricting consideration of mitigation creates a risk of an inappropriately severe sentence. *Lockett*, 438 U.S. at 605. Since "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Id.* at 604, states must be able to consider the mitigating evidence of childhood abuse without having to first find a causal connection between the abuse and the crime. Since it is mitigation, the sentencer should include it in the weighing process.

2. The Arizona Courts Flatly Refuse to Recognize This Court's Prior Holdings That a Traumatic Upbringing Is Mitigating Evidence.

Mr. Phillips' abusive and dysfunctional childhood and resulting emotional troubles were clearly established in a court of law by a preponderance of the evidence. The Arizona Supreme Court refused to consider this evidence as mitigation because there was no causal connection between his abysmal childhood and his appreciation of the wrongfulness of the conduct or ability to control his conduct. *Phillips* I, 46 P.3d at 1060 at 59-61.

Courts in other jurisdictions have faithfully followed this Court's precedent and

determine that evidence of a traumatic upbringing is mitigating.[11] Arizona, however, regularly dismisses uncontroverted evidence of childhood abuse as irrelevant in the absence of proof that it somehow caused the crime. The Arizona Supreme Court has historically restricted its consideration of mitigation where a defendant proves that he suffered an abusive childhood. The Court repeatedly refuses to consider evidence of a dysfunctional family as mitigation without a causal connection to the defendant's ability to perceive, comprehend, or control his actions. See *State v. Sansing*, 26 P.3d 1118, 1131 (2001); *State v. Hoskins*, *supra* at 1023; *State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171 (1999); *State v. Mann*, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); *State v. McKinney*, 185 Ariz. 567, 587, 917 P.2d 1214, 1233 (1996); *State v. Laird*, 186 Ariz. 203, 920 P.2d 769 (1996); *State v. Murray (Robert)*, 184 Ariz. 9, 906 P.2d. 542 (1995); *State v. Walden*, 183 Ariz. 595, 905 P.2d 974 (1995); *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied*, 516 U.S. 878 (1995). Sentencing judges are prevented, as a matter of Arizona law, from considering proven evidence of a difficult upbringing unless a causal connection is established.

> **A dysfunctional family background or difficult childhood can be mitigating only if the defendant can establish that early experiences, however negative, affected later criminal behavior in ways that were beyond his control. Thus, family dysfunction ... can be mitigating only when actual causation is demonstrated between early abuses suffered and the defendant's subsequent acts.**

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[11] *See Wright v. Cowan*, 149 F.Supp.2d 523, 527-38 (C.D.Ill.,2001) (traumatic childhood is mitigating); *Boyd v. French*, 147 F.3d 319, 325 (4th Cir. 1998) (troubled upbringing entitled is mitigating); *Blanco v. State*, 706 So.2d 7, 10-11 (Fla. 1997) (impoverished childhood is mitigating); *State v. Raglin*, 699 N.E.2d 482, 497 (Ohio 1998) (difficult childhood can be entitled to meaningful weight); *Guthrie v. State*, 689 So.2d 948 (Ala.Cr.App. 1996) (finding as nonstatutory mitigation that defendant's childhood was "not all that it could have been"); *Coleman v. State*, 741 N.E.2d 697 (Ind. 2000) ("difficult childhood" was entitled to some mitigating weight); *Buttrum v. State*, 293 S.E.2d 334 (Ga. 1982)(deprived childhood is mitigating).

Hoskins, 14 P.3d at 1021. "The factual circumstances of defendant's childhood, though extremely difficult, *do not translate into relevant mitigation* of his premeditated crimes." *Id.* (emphasis added).

The Arizona statute challenged herein, A.R.S. § 13-703, was found over 10 years ago in *Walton v. Arizona* to be constitutional because Mr. Walton was "not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence," but instead was challenging the burden of proof by which mitigation should be considered. 497 U.S. 639, 649 (1990). This Court expressly stated that it "has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty." *Id.* "A state may not preclude by statute, nor may a sentencer refuse to consider, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114.

Since *Walton*, however, the Arizona Supreme Court has repeatedly excluded an entire category of mitigating evidence offered by capital defendants: mitigating factors that could not be or were not proven to have caused the crime. Arizona courts are not *able* to consider a difficult childhood as mitigation, statutory or non-statutory, unless the causal connection is established; thus, entire types of mitigation are precluded in violation of the rule set forth in *Walton*.

This Court found such practice impermissible, where "the sentencing judge did not evaluate the evidence and find it wanting as a matter of fact; rather he found that as a matter of law he was unable to even consider the evidence." *Eddings*, 455 U.S. at 113. A categorical denial of credible evidence of a traumatic childhood because it did not cause the crime is tantamount to denying that evidence as a matter of law. There is a valid distinction between merely disbelieving evidence which a defendant offers and precluding consideration of that mitigating evidence altogether when it is proven. The latter approach,

which Arizona takes, is unconstitutional.

After all mitigating evidence is allowed in for consideration, then federal law allows states to structure their consideration of mitigating factors. For example, if a state decided to give more weight to the mitigating factor of age than to the mitigating factor of good behavior in prison, it could do so. Here, there was no "vehicle," under Arizona law, for the sentencing court to "express[] its 'reasoned moral response'" to the mitigating evidence. See *Penry I*, 492 U.S. at 328, and *Eddings*, 455 U.S. 104. A sentencing scheme that precludes individualized sentencing "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind." 492 U.S. at 304. Thus, the causal connection requirement, which excludes relevant evidence and deems it irrelevant, is a direct violation of the Eighth Amendment protections carved out in *Lockett*, *Eddings*, and their progeny.

3. **Even If a Causal Connection Were Constitutionally Permissible, Such Connection Was Demonstrated In This Case**.

Although a qualified medical professional, Dr. Larry Morris, testified that Mr. Phillips' abusive and dysfunctional childhood affected his capacity to control or conform his actions on the night of the crime, the Arizona Supreme Court refused to find a causal connection. As shown from Mr. Phillips' case, Arizona's requirement that such a relationship be proved thus effectively prevents the sentencer from considering such evidence at all in most cases. If certiorari is granted here, Arizona's gross and systemic disregard of the teachings of *Lockett* and *Eddings* should be corrected.

F. **Respondent Was Denied His Right to Counsel When the Arizona Supreme Court Consolidated His Case with 30 Others and Appointed One Lawyer to Brief and Argue for All Defendants**.

Following this Court's remand of Respondent's case to the Arizona Supreme Court for consideration in light of *Ring II*, the Arizona Supreme Court consolidated Respondent's

case with those of thirty other capital defendants then pending direct appeal. The Court further ordered that one "lead counsel" would be responsible for all briefing and argument before that Court. Although Respondent objected repeatedly to this process, he was forced to accept representation by one lawyer, counsel for Timothy Ring. As a result, Respondent was not able to present all of the arguments entitling him to relief. By compelling him to accept conflicted counsel and forcing him to rely on the truncated and over-generalized arguments that resulted, Respondent was deprived of effective representation under the Sixth Amendment.

Arizona requires that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Ariz. R. Sup.Ct. 81, Canon 3.B(7). The ethical requirement that a court must allow a defendant the right to be heard was more compelling here, for the requirement fulfills the constitutional mandate for the enactment of capital sentencing statutes by the states. To pass constitutional muster, a capital sentencing scheme must allow for an individualized determination of death-worthiness that includes a full consideration of any mitigating circumstances, and that weighs the appropriateness of the death sentence for the person and the crime.

> **For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."**

Penry v. Johnson, 532 U.S. 782, 797 (2001)(internal citations omitted).

By adopting the consolidation strategy, the vast majority of the thirty-one defendants were not heard. Not only were the procedural postures of the defendant's cases varied,[12]

[12] The procedural postures of the consolidated case ranged from appellants who had not even filed their appellate briefs to appellants whose appeals had been decided,

but at least seven different aggravators were at issue, in some cases singly and in others in combination. By allowing the filing of only one brief, and the argument of only one lawyer – and that a lawyer totally unfamiliar and incapable of becoming familiar with the specific facts and legal issues pertinent to most of the appellants' crucial arguments – it was impossible for the court to be adequately informed on the issues before it. This precluded an application of law to the facts of an individual's case.

The reality of the consolidation orders was this: regardless of which counsel attempted the impossible task of effectively drafting and filing the brief, no counsel could be selected who represented a client on every issue involved. Thus, of necessity, on numerous issues, clients did not receive the critical ingredient of undivided loyalty and diligent and zealous advocacy to which each was entitled. Yet, given that this was the only brief the court considered on behalf of Respondent on these life and death issues, his counsel had no alternative but to include Respondent on the brief despite serious concerns about arguments and facts included in, and omitted from, the brief.

The conflict was magnified at oral argument. The court allowed one forty-five minute argument by one counsel on the varying issues, only a few of which affected all Appellants and most of which affected only some, but not other, Appellants. Although any oral argument requires counsel to choose what issues on which to focus, this case presented additional, insurmountable obstacles to the counsel who attempted to represent all of the Appellants, including those whose best interests diverged from arguing counsel's client.[13]

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and remanded by this Court after certiorari review.

[13]For example, legal and arguing counsel's client, Timothy Ring, was convicted of one, and only one, aggravating factor: pecuniary gain. Respondent was convicted of two aggravating factors: prior conviction and pecuniary gain. Mr. Ring's case, then, did not even present several issues critical to Respondent: 1) whether prior conviction aggravating factors are exempt from *Ring II*; 2) whether a finding of one aggravating factor which arguably does not violate *Ring II* ends a court's inquiry; and 3) whether the pecuniary gain finding by a judge can ever be harmless.

Arguing counsel had an obligation to select issues to argue that would not harm his client or any other appellant in the consolidated group. Of course, that could not be done. Even if it could, counsel would necessarily have violated his duty of loyalty and zealous representation to the individual client to represent only the client's interests, and not serve two, much less thirty, other masters with varying and conflicting interests. See *Glasser v. United States*, 315 U.S. 60, 75 (1942). In the final analysis, the consolidation procedure allowed no appellant to receive what the constitution requires: an effective counsel who "play[s] the role of an active advocate, rather than a mere friend of the court," *Evitts v. Lucey*, 469 U.S. 387, 394 (1985), and who observes a duty of "zealous and loyal representation," *Nix v. Whiteside*, 475 U.S. 157, 188 (1986). And the most insidious element of the harm is that it is most apparent in what is not apparent at all, hidden from view by the sin of omission. As this Court explained in *Holloway v. Arkansas*, 435 U.S. 475, 489-490 (1978): "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."

In *Strickland v. Washington*, 466 U.S. 668, 685 (1984), this Court explained that a fair trial depended upon adversarial testing, and that adversarial testing in turn depended upon effective counsel:

> **That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.**

Id. This Court also defined what counsel was expected to bring to the court on behalf of his client:

> **Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process**.

Id. at 688. Here, by asking one lawyer to write and speak on behalf of all thirty-one, the court promoted precisely the opposite: conflicted counsel was put into a position where he could not advocate any single appellant's cause, and was placed under restrictions of time and space so that he could not utilize his skill and knowledge on behalf of each appellant. Unable to advance arguments that reflected effective counsel to each appellant, his representation of all was *per se* ineffective.

These concerns are no less vital on appeal. *Penson v. Ohio*, 488 U.S. 75, 86-88 (1988). It is the responsibility of the appellate court to ensure that counsel's representation "be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." *Glasser v. United States*, 315 U.S. at 70. *See also, Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Kennedy, J., dissenting) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests."). The conflict and its consequences were presented repeatedly to the court, which in turn ignored the conflict, presumptively undermining the adversarial process. *Mickens v. Taylor*, 122 S.Ct. 1237, 1241-1242 (2002)(*quoting Holloway*, 435 U.S. at 488, 490 (1978) ("The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively seal his

lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors."); *see also Glasser*, 315 U.S. at 71 ("instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of those rights.") A certiorari grant which might result in a remand to the Arizona Supreme Court should address this issue of whether Respondent was denied his right to counsel on appeal due to the conflict.

CONCLUSION

Because the Arizona Supreme Court's decision rests on state law, and because the disposition of the case Petitioner challenges is correct for a number of reasons in addition to those adopted by the Arizona Supreme Court, the Petition For Writ of Certiorari should be denied. If the Petition is granted, the Arizona Supreme Court's decision should be affirmed for all the reasons set out above.

RESPECTFULLY SUBMITTED this 22nd day of September.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

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John F. Palumbo
Attorney for Respondent

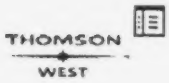
APPENDIX A

AZ LEGIS 255 (2003)

ARIZONA 2003 LEGISLATIVE SERVICE First Regular Session of the Forty-Sixth • • •

CHAPTER 255

Approved by the Governor, May 26, 2003. (Approx. 7 pages)



2003 Ariz. Legis. Serv. Ch. 255 (S.B. 1267) (WEST)

ARIZONA 2003 LEGISLATIVE SERVICE
First Regular Session of the Forty-Sixth Legislature
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Additions are indicated by **Text**; deletions by ~~Text~~. Changes in tables are made but not highlighted.

CHAPTER 255
S.B. 1267
CRIMES

AN ACT AMENDING SECTIONS 13-703 AND 13-703.01, ARIZONA REVISED STATUTES; AMENDING SECTION 13-703.01, ARIZONA REVISED STATUTES, AS AMENDED BY THIS ACT; REPEALING SECTION 13-4426, ARIZONA REVISED STATUTES; AMENDING TITLE 13, CHAPTER 40, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 13-4426 AND 13- 4426.01; RELATING TO CRIMES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 13-703, Arizona Revised Statutes, is amended to read:

<< AZ ST § **13-703** >>

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition

A. ~~A person guilty~~ **If the state has filed a notice of intent to seek the death penalty and the defendant is convicted** of first degree murder as defined in section 13-1105 ~~shall suffer~~, **the defendant shall be sentenced to** death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in section 13-703.01. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age.
B. At the aggravation phase of the sentencing proceeding that is held pursuant to section 13-703.01, the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence applicable to criminal trials. The burden of establishing the existence of any of the aggravating circumstances set forth in subsection F of this section is on the prosecution. The prosecution must prove the existence of the aggravating circumstances beyond a reasonable doubt.
C. At the penalty phase of the sentencing proceeding that is held pursuant to section 13-703.01, the prosecution or the defendant may present any information that is relevant to any of the mitigating circumstances included in subsection G of this section, regardless of its admissibility under the rules governing admission of evidence at criminal trials. The burden of establishing the existence of the mitigating circumstances included in subsection G of this section is on the defendant. The defendant must prove the existence of the mitigating circumstances by a preponderance of the evidence. If the trier of fact is a jury, the jurors do not have to agree unanimously that a mitigating circumstance has been proven to exist. Each juror may consider any mitigating circumstance found by that juror in determining the appropriate penalty.
D. Evidence that is admitted at the trial and that relates to any aggravating or mitigating circumstances shall be deemed admitted as evidence at a sentencing proceeding if the trier of fact considering that evidence is the same trier of fact that determined the defendant's guilt. The prosecution and the defendant shall be permitted to rebut any information received at the aggravation or penalty phase of the sentencing proceeding and shall be given fair opportunity to

present argument as to whether the information is sufficient to establish the existence of any of the circumstances included in subsections F and G of this section.
E. In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.
F. The trier of fact shall consider the following aggravating circumstances **in determining whether to impose a sentence of death:**
1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
2. The defendant **has been or** was previously convicted of a serious offense, whether preparatory or completed. **Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.**
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
7. The defendant committed the offense while:
(a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.
(b) On probation for a felony offense.
8. The defendant has been convicted of one or more other homicides, as defined in section 13-1101, that were committed during the commission of the offense.
9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.
G. The trier of fact shall consider as mitigating circumstances any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:
1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
5. The defendant's age.
H. For the purposes of this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:
1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.
5. Sexual assault.

6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.

Sec. 2. Section 13-703.01, Arizona Revised Statutes, is amended to read:

<< AZ ST § **13-703.**01 >>

§ 13-703.01. Sentences of death, life imprisonment or natural life; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death **in accordance with the procedures provided in this section**. If **the trier of fact determines that a sentence of death is not appropriate, or if** the state has not filed a notice of intent to seek the death penalty, and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under section 13-703, subsection F.

C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.

D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.

E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.

F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-703, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.

G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.

I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.

J. At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.

K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.
N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.
O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.
P. The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence.
Q. If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a sentence of life or natural life. In determining whether to impose a sentence of life or natural life, the court:
1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.
2. Shall consider the aggravating and mitigating circumstances listed in section 13-702 and any statement made by a victim.
~~Q.~~ **R.** Subject to the provisions of section 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present and to present information at the penalty phase. At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact.
~~R.~~ **S.** For the purposes of this section:
1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.
2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.
Sec. 3. Section 13-703.01, Arizona Revised Statutes, as amended by section 2 of this act, is amended to read:

<< AZ ST § **13-703.**01 >>

§ 13-703.01. Sentences of death or life imprisonment; imposition; sentencing proceedings; definitions

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder, the trier of fact at the sentencing proceeding shall determine whether to impose a sentence of death in accordance with the procedures provided in this section. If the trier of fact determines that a sentence of death is not appropriate, or if the state has not filed a notice of intent to seek the death penalty, and the defendant is convicted of first degree murder, the court shall determine whether to impose a sentence of life or natural life.

B. Before trial, the prosecution shall notice one or more of the aggravating circumstances under section 13-703, subsection F.
C. If the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.
D. If the trier of fact finds that one or more of the alleged aggravating circumstances have been proven, the trier of fact shall then immediately determine whether the death penalty should be imposed. This proceeding is the penalty phase of the sentencing proceeding.
E. At the aggravation phase, the trier of fact shall make a special finding on whether each alleged aggravating circumstance has been proven based on the evidence that was presented at the trial or at the aggravation phase. If the trier of fact is a jury, a unanimous verdict is required to find that the aggravating circumstance has been proven. If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant.
F. The penalty phase shall be held immediately after the trier of fact finds at the aggravation phase that one or more of the aggravating circumstances under section 13-703, subsection F have been proven. A finding by the trier of fact that any of the remaining aggravating circumstances alleged has not been proven or the inability of the trier of fact to agree on the issue of whether any of the remaining aggravating circumstances alleged has been proven shall not prevent the holding of the penalty phase.
G. At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.
H. The trier of fact shall determine unanimously whether death is the appropriate sentence. If the trier of fact is a jury and the jury unanimously determines that the death penalty is not appropriate, the court shall determine whether to impose a sentence of life or natural life.
I. If the trier of fact at any prior phase of the trial is the same trier of fact at the subsequent phase, any evidence that was presented at any prior phase of the trial shall be deemed admitted as evidence at any subsequent phase of the trial.
J. At the aggravation phase, if the trier of fact is a jury, the jury is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
K. At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
L. If the jury that rendered a verdict of guilty is not the jury first impaneled for the aggravation phase, the jury impaneled in the aggravation phase shall not retry the issue of the defendant's guilt. If the jury impaneled in the aggravation phase is unable to reach a verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found not proved by unanimous verdict. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.
M. Alternate jurors who are impaneled for the trial in a case in which the offense is punishable by death shall not be excused from the case until the completion of the sentencing proceeding.
N. If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred.

O. In any case that requires sentencing or resentencing in which the defendant has been convicted of an offense that is punishable by death and in which the trier of fact was a judge or a jury that has since been discharged, the defendant shall be sentenced or resentenced pursuant to this section by a jury that is specifically impaneled for this purpose.
P. The trier of fact shall make all factual determinations required by this section or the Constitution of the United States or this state to impose a death sentence.
Q. If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a sentence of life or natural life. In determining whether to impose a sentence of life or natural life, the court:
1. May consider any evidence introduced before sentencing or at any other sentencing proceeding.
2. Shall consider the aggravating and mitigating circumstances listed in section 13-702 and any statement made by a victim.
R. Subject to the provisions of section 13-703, subsection B, a victim has the right to be present at the aggravation phase and to present any information that is relevant to the proceeding. A victim has the right to be present ~~and to present information~~ at the penalty phase. At the penalty phase, the victim ~~may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact~~ **has the right to be heard pursuant to section 13-4426**.
S. For the purposes of this section:
1. "Trier of fact" means a jury unless the defendant and the state waive a jury, in which case the trier of fact shall be the court.
2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.
Sec. 4. Repeal

<< Repealed: AZ ST § 13-4426 >>

Section 13-4426, Arizona Revised Statutes, is repealed.
Sec. 5. Title 13, chapter 40, Arizona Revised Statutes, is amended by adding a new section 13-4426, to read:

<< AZ ST § 13-4426 >>

§ 13-4426. Sentencing

Notwithstanding any other law or rule, as an exercise of the victim's constitutional right to be heard at sentencing, before the imposition of sentence the victim in any case may address the sentencing authority and present any information or opinions that concern the victim or the victim's family, including the impact of the crime on the victim, the harm caused by the crime, the criminal offense, the defendant, the need for restitution or the sentence to be imposed at every sentencing or disposition proceeding.
Sec. 6. Title 13, chapter 40, Arizona Revised Statutes, is amended by adding section 13-4426.01, to read:

<< AZ ST § 13-4426.01 >>

§ 13-4426.01. Sentencing; victims' right to be heard

In any proceeding in which the victim has the right to be heard pursuant to article II, section 2.1, Constitution of Arizona, or this chapter, the victim's right to be heard is exercised not as a witness, the victim's statement is not subject to disclosure to the state or the defendant or submission to the court and the victim is not subject to cross-examination. The state and the defense shall be afforded the opportunity to explain, support or deny the victim's statement.

<< Note: AZ ST § **13-703** >>

Sec. 7. Intent

A. The Legislature reaffirms its action in Laws 2002, fifth special session, chapter 1, in which the Legislature eliminated the statutory prohibition on considering a victim's sentencing recommendation in a capital case. The Legislature reaffirms that, under the Constitution and statutes of Arizona, victims in capital cases have the right to make recommendations regarding the appropriate sentence, in the same manner as defendants, and that the only thing that stands in the way of exercising this right is the lack of a decision by the Arizona supreme court or the supreme court of the United States affirming this right.

B. The Legislature enacts sections 3, 4 and 5 of this act pursuant to its authority as prescribed by article II, section 2.1, subsection A, paragraph 11 and subsection D, Constitution of Arizona.

Sec. 8. Conditional enactment

A. The following do not become effective unless on or before June 30, 2013 the Arizona supreme court or the supreme court of the United States rules that it is constitutional for a crime victim in a capital case to make a sentencing recommendation:

<< Note: AZ ST § **13-703.**01 >>

1. Section 13-703.01, Arizona Revised Statutes, as amended by section 3 of this act.

2. Section 4 of this act.

<< Note: AZ ST § 13-4426 >>

3. Section 13-4426, Arizona Revised Statutes, as added by this act.

B. The attorney general shall notify in writing the director of the Arizona legislative council of the date on which the condition is met or if the condition is not met.

Approved by the Governor, May 26, 2003.

Filed in the Office of the Secretary of State, May 27, 2003.

AZ LEGIS 255 (2003)
END OF DOCUMENT

Copr. (C) West 2003 No Claim to Orig. U.S. Govt. Works

APPENDIX B

JUN 10 2003

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
June 5, 2003 (12:03 p.m.)
By: V. Freeland / cg

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. HOWARD FELL

CASE NO. **CR-61684**

COURT REPORTER: NONE

DATE: June 5, 2003

STATE OF ARIZONA

VS.

KEITH ROYAL PHILLIPS

MINUTE ENTRY

UNDER ADVISEMENT RULING ON PETITION FOR POST-CONVICTION RELIEF:

Petitioner, KEITH ROYAL PHILLIPS, was charged with one count of Armed Robbery with a Deadly Weapon or Dangerous Instrument, one count of Aggravated Assault with a Deadly Weapon or Dangerous Instrument, and one count of Kidnapping. All three charges arose from a robbery that occurred at the Silver Room on April 26, 1998. Petitioner was tried and convicted by a jury on all three counts charged. On October 8, 1998, Petitioner was sentenced to the presumptive term of 10.5 years for Counts One and Three and 7.5 years for Count Two, with the sentences to run concurrently. At the same time that Petitioner was facing charges for the Silver Room robbery he was also awaiting trial on charges stemming from three other robberies. Petitioner ultimately received a death sentence in the other case.

Petitioner appealed his conviction in the instant case on the grounds that the jury instructions were defective. On June 24, 1999, the Court of Appeals affirmed the conviction. In April of 2001, Petitioner filed a Petition for Post-Conviction Relief. This Court denied relief on September 9, 2001. Petitioner filed a Petition for Review and on November 13, 2002, the Court of Appeals granted relief. An evidentiary hearing was held on May 19, 2003. At the evidentiary hearing testimony was presented

Vicki Freeland / cg
Deputy Clerk

concerning trial counsel's failure to interview Jessica Phillips and present her testimony to support an alibi defense, the circumstances surrounding Petitioner's decision not to testify and trial counsel's failure to introduce expert testimony concerning eyewitness identification to support the defense of misidentification.

> In discussing trial counsel's failure to interview Ms. Phillips the Court of Appeals stated:
> It is true that "disagreements as to trial strategy or errors in trial tactics will not support an [in]effectiveness claim so long as the challenged conduct could have [had] some reasoned basis" State v. Meeker, 143 Ariz. 256, 262, 693 P.2d 911, 917 (1984). The key here, however, is counsel's failure to gather the underlying information necessary to make "a calculated and informed decision" not to call Jessica to testify, when he had not contacted or interviewed her to determine what she had to say or what kind of witness she would make...We are troubled not only by counsel's failure to interview Jessica but by his apparent failure to list her as a witness in pretrial disclosure after having noted in the prehearing conference statement that Phillips was asserting an alibi defense.

State v. Phillips, 2CA-CR 2002-0030-PR, pp. 4-5 (Memorandum Decision, Nov. 13, 2002).

At the evidentiary hearing trial counsel did not provide an adequate explanation for his failure to interview Ms. Phillips. Trial counsel asserted that he did not believe Ms. Phillips would be a credible witness because she was the Petitioner's wife. However, if this logic were sound, an alibi defense would rarely be viable. The nature of an alibi defense, for the most part, requires that someone who knows the defendant testify as to the defendant's whereabouts at the time the crime occurred. If such a witness were automatically discounted simply because of their relationship with the defendant, no alibi witness would ever need to be interviewed. The Arizona Supreme Court essentially rejected this line of thinking in State v. Tapia, 151 Ariz. 62, 725 P.2d 1096 (1986), by holding that trial counsel's failure to interview and call the defendant's girlfriend and father as alibi witnesses constituted ineffective assistance of

counsel. Id. at 65, 725 P.2d at 1099.

At the evidentiary hearing Ms. Phillips was an articulate, sympathetic and believable witness who likely would have bolstered the Petitioner's case had she testified at his original trial. The fact that, years after the crime occurred, Ms. Phillips confused the actual dates does not have any bearing on her credibility. Ms. Philips made it clear that, at the time she heard about the crime, she knew that Petitioner had been with her and could not have committed the crime. Furthermore, to this day she remembers that he was with her the night of the Silver Spoon robbery because that was the last night they spent together since he was arrested the next day involving his other charges. Thus,

THE COURT FINDS that trial counsel denied the Petitioner his sixth amendment right to the effective assistance of counsel when he failed to interview Ms. Phillips prior to trial and failed to call her as an alibi witness. Id.

At the evidentiary hearing Petitioner testified that he had told trial counsel from the beginning of his representation that he was innocent, that he wanted to testify and that his wife could verify his alibi. Petitioner testified that trial counsel told him that he would face perjury charges if he testified and was convicted and that those charges would be used to support a death sentence in his other case. Petitioner further testified that, since trial counsel refused to call Ms. Phillips, he believed that his testimony would be worthless because it would be uncorroborated. Trial counsel testified that he had told the Petitioner early on that he did not think it would be a good idea for Petitioner to testify. Trial counsel admitted that he told Petitioner about the possibility of a perjury charge and that he was not going to allow the Petitioner to testify if there was any way to convince him otherwise. Trial counsel testified that, had the Petitioner persisted in his desire to testify, trial counsel would have asked for a recess and called Petitioner's attorneys in his capital case to try to convince Petitioner not to testify. This was not necessary however, because as trial counsel put it, after a heated discussion, Petitioner acquiesced and agreed not to testify.

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The ultimate decision whether to testify was Petitioner's to make after receiving accurate legal advice. It is clear from the testimony elicited at the evidentiary hearing that the Petitioner was given erroneous legal advice concerning the consequences of his testimony, that Petitioner insisted on testifying, and that it was only after receiving the inaccurate legal advice and realizing that trial counsel had failed to call Ms. Phillips as a witness that the Petitioner acquiesced to trial counsel's advice and agreed not to testify. The State argues that, since Petitioner admitted that the fact that Ms. Phillips had not been called as a witness influenced his decision not to testify, trial counsel was not ineffective. This argument is not persuasive because, as stated above, trial counsel was ineffective for his handling of Ms. Phillip's possible testimony and such ineffectiveness does not negate his ineffectiveness with regard to the Petitioner's decision not to testify, it only compounds it. Thus,

THE COURT FINDS that trial counsel denied the Petitioner his constitutional right to testify in his own behalf by providing him with inaccurate legal advice.

After hearing the evidence presented at the evidentiary hearing concerning an expert identification witness,

THE COURT FURTHER FINDS that trial counsel was not ineffective for failing to call an expert identification witness.

As the Court of Appeals noted:

> [E]very defendant is constitutionally entitled to the presumption of innocence, and a defense lawyer too firmly convinced of his or her client's guilt before trial may not mount the same energetic defense the lawyer would present on behalf of a client believed to be innocent and wrongly accused....Whether counsel's emphatic and unquestioned belief in his client's guilt might thus have compromised Phillip's defense is a question for the trial court to resolve at

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an evidentiary hearing."

State v. Phillips, 2CA-CR 2002-0030-PR, pp. 7-9 (Memorandum Decision, Nov. 13, 2002).

After hearing the evidence presented at the evidentiary hearing and weighing the credibility of the witnesses,

THE COURT FINDS that trial counsel's conviction that his client was guilty colored counsel's tactical and strategic decisions.

THE COURT FURTHER FINDS that trial counsel was ineffective for failing to interview Jessica Phillips and for giving the Petitioner inaccurate advice concerning his decision whether or not to testify.

IT IS ORDERED that the Petitioner's Petition for Post-Conviction Relief is granted, the trial can not be relied on as having produced a just result. Thus,

IT IS FURTHER ORDERED that the Judgment of Guilt and Sentence of October 8, 1998, is hereby vacated and set aside.

IT IS FURTHER ORDERED that this matter is scheduled for a Status Conference on June 23, 2003, at 10:30 a.m. in Division SR.

Howard Fell
HON. HOWARD FELL

cc:
Hon. Howard Fell
Criminal Calendaring
County Attorney - Baird Greene
Public Defender - John Palumbo
Clerk of Court - Under Advisement Clerk
Sheriff - 1 certified
DOC - 1 certified
Indigent Legal Services

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Deputy Clerk